Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

BOARD OF WATER, LIGHT AND SINKING FUND COMMISSIONERS OF THE CITY OF DALTON, GEORGIA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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November 20, 2000

Questions Presented for Review

1. Can generic findings of systemic monopoly conditions and the resulting potential for anticompetitive behavior support a generic finding by the Federal Energy Regulatory Commission of unlawful undue discrimination under the first prong of section 206(a) of the Federal Power Act by public utilities that own, control or operate electric transmission lines in the absence of record evidence that any of them is actually engaged in an unduly discriminatory practice affecting a rate, charge or classification?

2. Assuming that the Commission made the requisite findings as to unlawful undue discrimination, does it have remedial authority under the second prong of section 206(a) to issue a generic order requiring all public utilities to transmit electric energy for third parties under a prescribed open access tariff in light of this Court's opinion in Otter Tail that Congress rejected a pervasive regulatory scheme empowering the Commission to order wheeling?

Parties to the Proceeding

1. Petitioner is the Board of Water, Light and Sinking Fund Commissioners of the City of Dalton, Georgia (dba Dalton Utilities), created by act of the Georgia legislature, controls and operates the public utility facilities owned by the City of Dalton, Georgia, providing electric power, natural gas, water and waste water disposal services to residential, commercial and industrial consumers in the City of Dalton and its environs. Over half the tufted carpets manufactured in the United States are produced in some 150 plants provided with utility services by Dalton Utilities.

2. The following is a list of the parties to the proceeding before the Court of Appeals:

Federal Energy Regulatory Commission
Action Alliance of Senior Citizens of Greater Pennsylvania,
Citizens for a Sound Economy, Citizen Power, Inc.
Pennsylvania Consumer Action Network,
Public Citizen, Inc., Safe Energy Communication Council, United Homeowners Association, and U.S. Public Interest Research Group
Alabama Power Company, et al.
(The Southern Companies)
American Public Power Association
American Forest & Paper
American Iron and Steel Institute, Chemical Manufacturers
Association, Council of Industrial Boiler Owners
Arkansas Public Service Commission
Atlantic City Electric Company
Board of Water, Light and Sinking Fund Commissioners of the City of Dalton, Georgia

Boston Edison Company, et al.
Cajun Electric Power Coop. Inc.
Carolina Power & Light Company
Central Montana Electric Power Cooperative, Inc.
Central Power & Light Company,
West Texas Utilities Company,
Public Service
Public Service Company of Oklahoma,
Southwestern Electric Power Company
Central Vermont Public Service Corporation
Cincinnati Gas & Electric Co., PSI Energy
Citizens Action Coalition of Indiana, Inc.
Cities of Benton, et al.
City of Alma, Michigan
City of Cleveland, Ohio
The City and County of San Francisco
City of Lakeland, Florida
City of Redding, California
City of Santa Clara, CA
City of Tallahassee, Florida
Coalition for Economic Competition
Commonwealth Edison Company
Consolidated Edison Company of New York, Inc.
Consumers Energy Company
CSW Operation Companies
(Central Power & Light Company, West Texas Utilities Company, Public Service Company of Oklahoma and Southwestern Electric Power Company) Southwestern Electric Power Co.
Dairyland Power Cooperative
The Dayton Power and Light Co.
The Detroit Edison Company
Duke Energy Trading and Marketing
(Formerly Panenergy Trading and Market Services)
Edison Electric Institute

Electric Clearinghouse, Inc.
Electricity Consumers Resource Council
Electric Power Supply Association
El Paso Electric Company, Cleveland Electric Illuminating Company
Enron Power Marketing Coalition for a Competitive Electric Market
Entergy Services, Inc.
First Energy Corp. (Formerly Ohio Edison Company, The Cleveland Electric Illuminating Co. and the Toledo Edison Co.)
Florida Municipal Power Agency
Michigan South Central Power Agency
Wolverine Power Supply Cooperative, Inc.
Florida Power Corporation
Florida Public Service Commission
Gainsville Regional Utilities
Georgia Transmission Corporation
GPU Energy Companies (Formerly, General Public Utilities Service, Inc.)
H.Q. Energy Services (U.S.) Hydro-Quebec
Idaho Public Utilities Commission
Illinois Commerce Commission
Illinois Power Company
Indiana Industrial Energy Consumers, Inc.
Indiana Office of Utility Consumer Counselor
Indianapolis Power & Light Co.
Jacksonville Electric Authority
Kansas City Power & Light Company
Kissimmee Utility Authority
Long Island Lighting Co.
Louisiana Energy and Power Authority
Massachusetts Municipal Wholesale Electric Company
Multiple Intervenors
Municipal Electric Authority of Georgia

Municipal Electric Utilities of Wisconsin
National Association of State Utility Consumer Advocates
National Rural Electric Cooperative Association
National Association of Regulatory Utility Commissioners
Nebraska Public Power District
New England Electric Service
New England Power Company
New Jersey Board of Public Utilities
New York State Electric & Gas Corporation
Niagara Mohawk Power Corp.
North Carolina Utilities Commission and the Public Staff of the North Carolina Utilities Commission
Northeast Texas Electric Cooperation of Texas, Inc.
Sam Rayburn G&T Electric
Tex-La Electric Cooperative of Texas, Inc.
Northeast Utilities Service Company and Northeast Utilities
Ohio Consumers' Counsel
Ontario Hydro
Operating Companies of the American Electric Power System
Pacific Legal Foundation Amicus Curiae
Panenergy Trading and Market Services
Pennsylvania Municipal Electric Association
Pennsylvania Rural Electric Association, et al.
People of the State of New York, et al.
Public Service Commission of th State of New York
Public Power Association of New Jersey
Public Service Company of New Mexico
Public Service Electric & Gas Company
Public Utilities Commission of the State of Colorado
Puget Sound Energy, Inc.
Rochester Gas & Electric Corporation

San Diego Gas & Electric Co.
Saskpower
Southern California Edison Co.
South Carolina Electric & Gas Company
Suffolk County Electrical Agency
Transmission Access Policy Study Group
Transmission Dependent Utility Systems
Vermont Depart of Public Service
Virginia Electric & Power Co.
Virginia State Corporation Commission
Washington Utilities and Transportation Commission
Wisconsin Power & Light Co.
Wisconsin Public Service Corp.
Wyoming Public Service Commission

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES ix

INDEX OF APPENDICES xii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

A. Part II Of The Federal Power Act 2

B. The Commission's Orders Under Review 4

C. The Court of Appeals Decision 5

REASONS FOR GRANT OF THE WRIT 7

A. As to the first prong of section 206(a). 7

B. As to the second prong of section 206(a). 10

ARGUMENT 14

Page

POINT I 14

GENERIC FINDINGS OF SYSTEMIC MONOPOLY CONDITIONS AND THE RESULTING POTENTIAL FOR ANTICOMPETITIVE BEHAVIOR CANNOT SUPPORT COMMISSION FINDINGS OF UNDUE DISCRIMINATION UNDER THE FIRST PRONG OF SECTION 206(a) OF THE FEDERAL POWER ACT 14

POINT II 22

THE COMMISSION LACKED AUTHORITY UNDER SECTION 206(a) TO ORDER PUBLIC UTILITIES TO ENGAGE IN INVOLUNTARY WHEELING 22

CONCLUSION 27

TABLE OF AUTHORITIES

Cases: Page

Arkansas Louisiana Gas Co. v. Hall,
453 U.S. 571 (1981) 12, 13

Associated Gas Distributors v. FERC,
824 F.3d 981 (D.C. Cir. 1987), ... passim
cert. denied, 485 U.S. 1006 (1988)

Chevron U.S.A. Inc. v. Natural Resources
Defense Council, 467 U.S. 837 (1984) ..... passim

City of Cleveland v. FERC,
773 F.2d 1368 (D.C. Cir. 1985) 16

Davis v. Michigan Dep't of the Treasury,
489 U.S. 803 (1989) 13

FPC. v. Conway,
426 U.S. 271 (1976) 4

FPC v. Louisiana Power & Light Co.,
406 U.S. 621 (1972) 12

FPC v. Sierra Pacific Power Co.,
350 U.S. 348 (1956) 8, 13, 15, 18

Florida Power & Light Co. v. FERC,
660 F.2d 668 (5th Cir. 1981)
cert. denied, 459 U.S. 1156 (1983) 8

Page

Greensboro Lumber Co. v. Georgia Power Co.,
643 F. Supp. 1345 (N. D. Ga. 1986), aff'd
Greensboro Lumber Co. v. Georgia Power Co.,
844 F.2d 1538 (11th Cir. 1988) 16, 17, 18

Gulf States Utilities Co. v. FPC,
411 U.S. 747 (1973) 3

Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,
497 U.S. 116 (1990) 11, 22

Nashville Milk Co. v. Carnation Co.,
355 U.S. 373 (1958) 4

New York State Electric & Gas Corp. v. FERC,
638 F.2d 388 (D.C. Cir. 1980), cert. denied,
454 U.S. 821 (1981) 26

Otter Tail Power Co. v. United States,
410 U.S. 366 (1973) ..... passim

People of the State of New York, et al. v. FERC,
Sup. Ct. No. 00-568 1

Public Utility Comm'n of Rhode Island v.
Attleboro Steam and Electric Co.,
273 U.S. 83 (1927) 3

Page

Transmission Access Policy Study Group, et al. v. FERC, 225 F.3d 667 (D.C. Cir. 2000) ..... passim

Wisconsin Gas Co. v. FERC, 770 F.2d 1144 (D.C. Cir. 1985), cert. denied, 476 U.S. 1114 (1986) 6, 10, 19, 21

Administrative Agency Orders:

Georgia Power Co., 57 FERC ¶61,087 (1991), reh'g granted, 57 FERC ¶61,353 (1991) 17

Order 436 23

Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶31,036 (1996), clarified, 76 FERC ¶61,009 and 76 FERC ¶61,347 (1996), on rehearing, Order No. 888-A, FERC Stats. & Regs. ¶31,048 (1997), order on rehearing, Order No. 888-B, 81 FERC ¶61,248 (1997), on rehearing, Order No. 888-C, 82 FERC ¶61,046 (1998) ..... passim

Regional Transmission Organizations, Order No. 2000, FERC Stats. & Regs. ¶31,089 (1999), on reh'g, FERC Stats. & Regs. ¶31,092 (2000) 7

Page

Statutes:

Administrative Procedure Act
§558(b) 7, 12
§706 ..... 7, 8, 9

Energy Policy Act of 1992, Title VII 26

Federal Power Act
§201(a) 8, 24
§202(b) 25
§205 ..... passim
§205(b) 3, 15
§206 ..... passim
§206(a) ..... passim
§211 ..... 12, 14, 26

Natural Gas Act
§4 19
§5 19
§5(a) 6, 10, 12, 13, 19
§7 ..... 23, 24
§7(a) 13
§7(b) 13
§7(e) 13, 14
§7(h) 13

Public Utilities Regulatory Policies Act 26

Public Utility Holding Company Act 2

Sherman Act
§2 24

Page

Miscellaneous:

Black's Law Dictionary (7th Ed. 1999) 12

HR Rep. No. 1318, 74th Cong., 1st Sess. 15

The New International Websters Comprehensive Dictionary of the English Language (1966 ed.) 15

Utility Corporations, Summary Report of the Federal Trade Commission to the Senate of the United States, 70th Cong., 1st Sess., Doc. 92, Part 72-A (1935) 2, 3, 15

INDEX TO APPENDICES

	Page
Appendix A - Extracts from Order 888	1a
Appendix B - Extracts from Order 888-A	62a
Appendix C - Statutory Provisions Invoked	98a
1. Administrative Procedure Act	99a
2. Federal Power Act	100a
3. Natural Gas Act	106a

PETITION FOR WRIT OF CERTIORARI

The Board of Water, Light and Sinking Fund Commissioners of the City of Dalton, Georgia, (Dalton) petitions for a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit involving orders of the Federal Energy Regulatory Commission ("Commission" or "FERC").

OPINIONS BELOW

The Opinion for which review is sought issued in Transmission Access Policy Study Group, et al. v. Federal Energy Regulatory Commission, 225 F.3d 667 (D.C. Cir. 2000). (TAPS) NY App. C.[1] On August 22, 2000, the Court of Appeals issued its order denying a petition for rehearing en banc filed by parties other than Dalton. NY App. A.[2] The relevant Commission orders are Order Nos. 888 and 888-A.[3]

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[1] Copies of the judgment of the Court of Appeals and its opinion have been filed as Appendices B and C, respectively, to the Petition for Writ of Certiorari in People of the State of New York, et al. v. FERC, Sup. Ct. No. 00-568. They are incorporated herein by reference and cited in this Petition for Certiorari as "NY App. B" and "NY App. C".

[2] A copy of this order, filed as Appendix A to the Petition for Certiorari in No. 00-568, is incorporated herein by reference and cited as "NY App. A".

[3] Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶31,036 (1996), clarified, 76 FERC ¶61,009 and 76 FERC ¶61,347 (1996), on rehearing, Order No. 888-A, FERC Stats. & Regs. ¶31,048 (1997), order on rehearing, Order No. 888-B, 81 FERC ¶61,248 (1997), on rehearing, Order No. 888-C, 82 FERC ¶61,046 (1998). Dalton appealed only Orders 888 and 888-A.

STATEMENT OF JURISDICTION

The judgement of the Court of Appeals was entered on June 30, 2000. The order of that court denying a timely-filed petition for rehearing en banc was issued August 22, 2000. This Petition for Certiorari is timely because filed within 90 days from the date of denial of the petition for rehearing en banc. Supreme Court Rule 13.3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

The relevant statutory provisions are provided in Appendix C.

STATEMENT OF THE CASE

A. Part II Of The Federal Power Act

Part II of the Federal Power Act (FPA) was enacted in 1935 as Title II of the Public Utility Holding Company Act. Congress granted to the Securities and Exchange Commission the authority to remedy perceived structural defects in the utility industry. 15 U.S.C.§§79, et seq. Part II vested in the Federal Power Commission limited jurisdiction over sales for resale (wholesales) of electric energy and transmission in interstate commerce. The legislation was a response to a history of abuses set out in a Federal Trade Commission report on the concentration of economic and political power in public utility holding companies. See Utility Corporations, Summary Report

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Extracts from Orders 888 and 888-A, filed in Sup. Ct. No. 00-568 as Appendices D and E, respectively, are incorporated herein by reference and cited as NY App. D and NY App. E. To the extent that Dalton has made available other pages of the two orders, they are reproduced in Appendices A and B to this Petition for Certiorari.

of the Federal Trade Commission to the Senate of the United States, 70th Cong., 1st Sess., Doc. 92, Part 72-A, Chapt. XI (1935) (Utility Corporations); HR Rep. No. 1318, 74th Cong., 1st Sess., 3. Part II was interstitial legislation designed to fill the regulatory gap created by this Court's decision in Public Utilities Comm'n of Rhode Island v. Attleboro Steam and Electric Co., 273 U.S. 83 (1927) (Attleboro). Part II had "two primary and related purposes: to curb abusive practices of public utility companies by bringing them under effective control, and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." Gulf States Utilities Co. v. FPC, 411 U.S. 747, 758 (1973).

The orders here on review were issued by the Commission pursuant to sections 205 and 206(a) of Part II, based on a generic finding of industry-wide undue discrimination in the transmission of energy in interstate commerce. As to discrimination, section 205(b) provides that no public utility shall, with respect to transmission subject to the Commission's jurisdiction, "make or grant any undue preference or advantage" or subject any person to any "undue prejudice or disadvantage". Under section 206(a), if, under the first prong, the Commission finds, after a hearing, that any rate, charge, or classification for jurisdictional services, or any rule, regulation, practice, or contract affecting such rate, charge, or classification "is . . . unduly discriminatory or preferential, the Commission shall determine [under the second prong] the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order." (Emphasis added.) In the 1994 edition of the United States Code, the word "affecting" reads "affected." The substitution first appears in the 1970 edition. As it is a palpable

error,[4] the underlying statute "must prevail." See Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 380 (1958).

B. The Commission's Orders Under Review

Order 888 was issued in a rulemaking proceeding. The Commission made generic findings under the first prong of section 206(a) that public utilities owning or controlling transmission facilities possess a natural monopoly which gives them market power which they have and can use to favor their own generated electricity and exclude competitors from the market, either by denying transmission or by charging comparatively unfavorable rates, terms and conditions; that such utilities naturally wish to maximize profits; that they could be expected to act in their own self interests to maintain their monopoly; and that "unduly discriminatory and anticompetitive practices exist today in the electric industry and, more importantly, that such practices will increase as competitive pressures continue to grow in the industry, unless the Commission acts now to prevent such practices." (footnote omitted) App. A at 54a. As a remedy, acting pursuant to the second prong of section 206(a), the Commission ordered each public utility to file a prescribed Open Access Transmission Tariff (OATT) and to provide involuntary transmission service under that tariff to third parties on request. NY App. D-9.

When its findings of undue discrimination were challenged on rehearing, the Commission admitted in Order 888-A: "We did not make a factual determination as to any particular allegation of past discrimination described in the Final Rule." App. B at 87a-88a. The Final Rule "does not, nor is it intended

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[4] Compare the text of section 206(a) quoted in FPC v. Conway, 426 U.S. 271, 281 (1976) in which the word "affecting" is used.

to, make specific findings as to any particular utility or any particular allegation raised." (Id. at n. 107) Nonetheless, the Commission refused to modify its generic finding of undue discrimination because the allegations "present credible examples of the types of discriminatory behavior in which public utilities could engage in the future." App. B at 88a.

On rehearing, the Commission also rejected arguments, based on Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (Otter Tail), that the Commission lacked authority under the FPA to order involuntary wheeling[5] of electric power as a remedy under the second prong of section 206(a) of the FPA. The Commission admitted that "there is no dispute that the FPA does not explicitly give the Commission authority to order sua sponte, open access transmission services by public utilities." App. B. at 68a. Nonetheless, it claimed that "it would turn statutory construction on its head to let the failure to grant a general power prevail over the affirmative grant of a specific one" (id., footnote omitted), namely, the power to impose a just and reasonable remedy to remedy undue discrimination.

C. The Court of Appeals Decision

Dalton challenged the Commission's orders before the Court of Appeals on the grounds that there was a lack of record support for the Commission's findings as to monopoly and undue discrimination. The court found: "FERC concedes that it relied upon general findings of systemic monopoly conditions and the resulting potential for anti-competitive behavior, rather than evidence of monopoly and undue discrimination on the part of individual utilities." NY App. C-20–C-21. The court agreed

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[5] "Wheeling" is "to transfer by direct transmission or displacement electric power from one utility to another over the facilities of an intermediate utility". Otter Tail, 410 U.S. at 368.

with the Commission that such findings are sufficient under section 206(a) to substantiate its decision to impose on public utilities an open access[6] transmission requirement in light of two prior decisions of the same court involving orders issued under the similar provisions of section 5(a) the Natural Gas Act (NGA), 15 U.S.C. §717d(a), Wisconsin Gas Co. v. FERC, 770 F.2d 1144 (D.C. Cir. 1985), cert. denied, 476 U.S. 1114 (1986) (Wisconsin Gas) and Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987) (AGD). The court went on to say: "while the Commission cannot rely solely on 'unsupported or abstract allegations,' the agency is also not required to make 'specific findings,' so long as the agency's factual determinations are reasonable." NY App. C-21. Comparing the Commission's orders involved in AGD with Order 888, the court concluded that "if anything, FERC more thoroughly documented the reasons for its actions in Order 888 than in the earlier natural gas order." Id. at C-22.

As to the Commission's authority under section 206(a) to require involuntary wheeling of power, the Court of Appeals agreed with the Commission that AGD rather than Otter Tail, "controls the disposition of this issue." (emphasis added) NY App. C-18. AGD "counsels the conclusion that, while Otter Tail may represent a general rule that FERC's authority to order open access is limited, the FPA, like the NGA, makes an exception to that rule where FERC finds undue discrimination." Id. at C-19. Having concluded that Otter Tail does not govern the disposition of the case, the court held that the deferential standard of Chevron U.S. A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) (Chevron) governed its review of

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[6] "Open access" has as its core "a duty to accept shipments from all would-be shippers." Associated Gas Distributors v. FERC, 824 F.2d 981, 997 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988).

the Commission's interpretations of sections 205 and 206; interpretations it found to be reasonable. Id. at C-19.

REASONS FOR GRANT OF THE WRIT

Petitioner seeks reversal of Order 888 because the order is contrary to both the letter and spirit of this Court's prior rulings in Otter Tail and Chevron, and the requirements of section 206(a) of the Federal Power Act and sections 558(b) and 706 of the Administrative Procedure Act. Order 888 issued over four years ago. Implemented immediately, it effected a significant change in the way public utilities do business. Most filed the mandated Open Access Transmission Tariff under which involuntary transmission services must be provided. The restructured services added new stresses to transmission grids not designed to handle them, a factor causing the Commission to issue Order 2000 seeking to ameliorate the situation by voluntary rearrangements of transmission control on a regional basis. See Regional Transmission Organizations, Order No. 2000, FERC Stats. & Regs. ¶31,089 at 30,996-97 (1999), on reh'g, Order No. 2000-A, FERC Stats. & Regs. ¶31,092 (2000).

A. As to the first prong of section 206(a).

1. The Court of Appeals failed to carry out this Court's instructions in Chevron. The court did not find the text ambiguous. Indeed, it is clear on its face. Congress enacted Part II because public utilities possessed monopoly power which they could abuse. The first prong of Section 206(a) requires that the Commission find, after a hearing, that a practice "affecting" a jurisdictional rate, charge or classification "is . . . unduly discriminatory or preferential." It is the "[m]aking or grant[ing]" of an undue preference that section 205(b) prohibits. The use of the present tense in each instance

is significant. As Dalton argued in the court below,"FPA §206(a) requires substantial evidence of contemporaneous 'unjust, unreasonable, unduly discriminatory or preferential' behavior before the Commission can act." NY App. C-20. Such findings are required under the first prong of section 206(a). See FPC v. Sierra Pacific Power Co., 350 U.S. 348, 353 (1956).

In Order 888-A the Commission abandoned its claim that evidence of record supported a finding of existing undue discrimination. Indeed, the Commission decided that the record did not justify the abrogation of existing transmission agreements. App. A at 33a. The Commission based its finding of generic undue discrimination on the public utilities' potential to violate the law by future undue discriminations. But this is not what the plain text of the law forbids. Section 206(a) does not empower the Commission to condemn and remedy based either on unproven allegations or a potential to violate the law. Therefore, the Commission's action was arbitrary and capricious and contrary to law within the meaning of section 706 of the Administrative Procedure Act. 5 U.S.C. §706

The Court of Appeals held that the deferential standard of Chevron governed its review of the Commission's interpretation of sections 205 and 206, NY App. C-19, despite the fact that the same court had previously concluded: "The legislative history of the FPA makes clear that the Commission lacks the authority to require electric utilities to provide wheeling even on a reasonable request." Florida Power & Light Co. v. FERC, 660 F.2d 668, 676 (5th Cir. 1981) cert. denied, 459 U.S. 1156 (1983). The court never came to grips with Dalton's argument that potential conduct could not rise to the level of a practice "affecting" a jurisdictional rate, charge or classification, which "is" an undue discrimination within the meaning of section 206(a). The court failed to take the first step in a Chevron

analysis by addressing Dalton's plain text challenge of the Commission's interpretation of the first prong of section 206(a). The court improperly sustained the Commission's interpretation of sections 205 and 206 without first finding the text of section 206(a) ambiguous as required by Chevron.

2. The failure of the court to either apply the text of the first prong of section 206(a) according to its plain text or rule that it was ambiguous is also contrary to section 706 of the Administrative Procedure Act which requires a reviewing court to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action" and "to hold unlawful and set aside agency action, findings and conclusions found to be - . . .(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right". 5 U.S.C. §706.

3. Section 206(a) requires that the practice being condemned be unduly discriminatory. The court failed to recognized that differences in service can be entirely consistent with this Court's determination in Otter Tail as to the role of commercial negotiations in arranging transmission service. The mere absence of open access, without evidence of actual undue discrimination, cannot support a finding that a public utility is violating section 206(a). Differences in service do not constitute undue discrimination. Undue discrimination occurs when a public utility unjustifiably fails to provide other parties access to its transmission system on terms and conditions equivalent to the public utility's own use of the system. Differences can be the entirely justifiable consequences of commercial negotiations, conduct entirely consistent with this Court's conclusion in Otter Tail: "Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships." 410 U.S. at 374.

4. Neither Wisconsin Gas nor AGD, based on section 5(a) of the NGA, serves to justify a determination that the potential to engage in undue discrimination constitutes a violation of section 206(a) of the FPA. Although the provisions of section 5(a) of the NGA are quite similar to those in section 206(a), neither case turned on a decision that the text of the first prong of section 5(a) was ambiguous. In each of the prior cases the Commission's determination of illegality was based on generic findings of actual unlawful practices. In neither case did the Commission act on the basis of "systemic monopolist conditions and the resulting potential for anti-competitive behavior". (emphasis added) NY App. C-21.

B. As to the second prong of section 206(a).

1. This Court ruled in Otter Tail: "So far as wheeling is concerned, there is no authority granted the Commission under Part II of the Federal Power Act to order it, for the bills originally introduced contained common carrier provisions which were deleted." (footnote omitted) 410 U.S. at 375. This finding was a necessary predicate to the Court's decision that the District Court could order wheeling as an antitrust remedy. The Commission admitted in Order 888-A that the FPC did not explicitly give it the authority to order, sua sponte, open-access transmission services by public utilities. App. B at 68a. Rather it sought to evade the determination in Otter Tail by reference to its duty under the second prong of section 206(a) to remedy undue discriminations which reads: "the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice or control to be thereafter observed and in force, and shall fix the same by order." Id.

2. Otter Tail was an antitrust case in which the District Court found that a public utility refused to sell electric-

ity to municipalities for resale and to grant them open access transmission on its grid when the municipalities attempted to obtain electric energy supplies from a federal agency in order to compete with the public utility in the retail sale of electric energy. This Court was called upon to determine whether the jurisdiction of the Federal Power Commission under the FPA over the transmission of energy in interstate commerce pre-empted court jurisdiction to fashion a remedy for the antitrust violations which would require the public utility to provide involuntary transmission services for the injured municipalities. After examining the legislative history, this Court found that Congress had eliminated from Part II of the FPA a common carrier provision as well as a provision that would have empowered the FPA to order wheeling if found to be in the public interest. This Court ruled: "These provisions were eliminated to preserve 'the voluntary action of the utilities.'. . . It is clear, then that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships. (citations to Congressional record omitted) 410 U.S. at 374 This Court concluded: "So far as wheeling is concerned, there is no authority granted the Commission under Part II of the Federal Power Act to order it, for the bills originally introduced contained common carrier provisions which were deleted." (footnote omitted.) Id. at 375. The text of the second prong of section 206(a) on which the Commission relies for its generic order requiring involuntary wheeling was in the original text of the FPA when enacted in 1935 and was present in the statute (but not the Code) in 1973 when Otter Tail was decided. It justifies no different ruling today.

3. Because of Otter Tail, the doctrine of stare decisis, not Chevron, should govern the issue as to the Commission's authority to order involuntary wheeling under the second prong of section 206(a). See Maislin Industries, U.S., Inc. v.

Primary Steel, Inc., 497 U.S. 116, 131 (1990) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.")

4. Order 888 is contrary to section 558(b) of the Administrative Procedure Act which provides: "A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. §558(b). Any remedy imposed under the second prong of section 206(a) must be "just and reasonable". To be "just" an action must conform to or be consonant with what is "[l]gally right; lawful; equitable." Black's Law Dictionary (7th ed. 1999) p. 868. As Order 888 exceeds the Commission's jurisdiction over transmission under the FPA, it is not just and reasonable.

5. It is obvious that the Commission felt a need to order all public utilities to engage in involuntary transmission. It chose not to act under section 211 of the FPA, 16 U.S.C. §824j, which empowered it to remedy undue discrimination by ordering involuntary transmission, because that provision did not enable it to remedy undue discrimination generically on its own initiative. App. A at 44a-44c. But a perceived need for regulation does not give the Commission a jurisdiction that Congress has not granted. FPC v. Louisiana Power & Light Co., 406 U.S. 621, 635-36 (1972).

6. The lower court's decision in AGD cannot limit this Court's jurisdictional determination in Otter Tail. The Commission seeks to find its authority to order generic involuntary transmission on the basis of the FPA's silence on the subject and by analogy to its decisions under the remedial second prong of section 5(a) of the NGA. In Arkansas Louisi-

ana Gas Co. v. Hall, 453 U.S. 571, 577 n. 7 (1981), this Court noted that "relevant provisions of the two statues 'are in all respects substantially identical'", quoting from FPC v. Sierra Pacific Power Co., 350 U.S. at 353. The proper question here is "what provisions are relevant to the issue before the Court?" In finding that AGD controlled the disposition of the wheeling issue in TAPS, the Court of Appeals failed to appreciate that, despite their similarities, there are essential differences between the FPA and the NGA as to issues involving the authority to compel involuntary transmission. This was recognized by the court below in AGD. Petitioners cited Otter Tail in that case in support of their argument that the Commission lacked authority under section 5(a) of the NGA to compel the transportation of natural gas through their pipelines. In rejecting this argument, the Court noted that "the legislative history of the two acts is, on this point, materially different." 824 F.2d at 998. A similar ruling is required in this case under the FPA.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view of their place in the overall statutory scheme." Davis v. Michigan Dep't of the Treasury, 489 U.S. 803, 809 (1989). There are material differences between the FPA and the NGA not only as to their legislative histories but also as to the specific grant of authority to construct and operate transmission facilities. Under section 7(a) of the NGA, 15 U.S.C. §717f(a), the Commission can order a pipeline to extend or improve its transportation facilities and to sell natural gas under specified circumstances. Service through jurisdictional facilities cannot be abandoned without Commission authorization under section 7(b), 15 U.S.C. §717f(b). Under section 7(e), 15 U.S.C. §717f(e), the Commission may grant requests to construct and operate natural gas pipelines subject to the Commission's jurisdiction and the Commission can attach reasonable conditions to such certificates. Under section 7(h), 15 U.S.C.

§717f(h), right of way can be condemned to facilitate the construction of certificated gas pipelines. There are no similar provisions in the FPA. It was not until Congress amended section 211 of the FPA in 1992 that the Commission obtained effective authority to order transmission, but then only on complaint and on a case-by-case basis. It was because of these very limitations on its jurisdiction under the FPA that the Commission chose not to attempt to issue a generic order requiring involuntary wheeling under section 211. App. A. at 44a-46a.

AGD involved the exercise of the Commission's authority to issue certificates of public convenience and necessity to interstate natural gas companies. As a consequence, the open access remedy was imposed only on pipelines which voluntarily sought authorization to operate under the more convenient and less expensive procedures required for issuance of blanket certificates of public convenience and necessity under section 7(e) of the NGA.

ARGUMENT

POINT I

GENERIC FINDINGS OF SYSTEMIC MONOPOLY CONDITIONS AND THE RESULTING POTENTIAL FOR ANTI-COMPETITIVE BEHAVIOR CANNOT SUPPORT COMMISSION FINDINGS OF UNDUE DISCRIMINATION UNDER THE FIRST PRONG OF SECTION 206(a) OF THE FEDERAL POWER ACT

1. In 1930, 98.5 percent of the total quantity of electric energy that moved in interstate commerce was transmit-

ted by operating companies in holding company groups. Transmission lines owned by holding companies extended in an almost unbroken chain from Boston to Tampa, and from Chicago to southern Mississippi. They crossed 88 of the 105 boundaries between different states. The network of high voltage transmission lines in interstate commerce were much less extensive when Part II of the FPA was enacted than they are today. Nonetheless, they were significant features of that part of the industry operating in the Attleboro gap. See Utility Corporations at pp. 39-44. The provisions of Part II were designed to meet a situation which had been created by the "recent rapid growth of electric utilities along interstate lines. The percentage of electric energy generated in the United States that was transmitted across State lines increased from 10.7 in 1928 to 17.8 in 1933. The amount of energy transmitted in interstate commerce in 1933 was greater than all of the energy generated in the country in 1913." HR Rep. No. 1318, 74th Cong., 1st Sess., 1.

2. Part II of the FPA was enacted to curb abuses by electric utilities in the sale for resale and transmission of electric energy in interstate commerce. Public utilities are free to negotiate contracts for transmission and wholesales in interstate commerce. However, they are required to file them with the Commission where they are subject to its review under the standards of the Act. FPC v. Sierra Pacific Power Co., 350 U.S. at 353. Section 205(b) forbids a public utility to "make or grant" any undue preference or advantage. To "make" means "to bring about the existence" of something. The New International Websters Comprehensive Dictionary of the English Language, p. 769 (1996 ed). To "grant" means "to give or accord". Id. at 550. It is not enough for a public utility to have the potential to engage in undue discrimination to transgress the law. The Commission must find under section 206(a) that the practice of a public utility is "affecting" a rate, charge or

classification, and that such practice "is" an undue discrimination before it can order a remedy. To "affect" is to "act upon or have an effect upon; impress, influence." Id. at 24. The effect must be significant if it is to come within section 206(a). See City of Cleveland v. FERC, 773 F.2d 1368, 1376 (D.C. Cir. 1985).

3. Dalton challenged the validity of the Commission's generic findings of systemic monopoly conditions by demonstrating that such conditions did not exist in the case of at least one public utility, Georgia Power Company (Georgia Power). Neither the Commission nor the court found otherwise. The evidence in this regard was simply treated as irrelevant as the court affirmed the Commission's use of generic findings of undue discrimination based on potential conduct.

Prior to the 1970s, Georgia Power enjoyed a monopoly in providing high voltage transmission of electric power in most of the State of Georgia. Georgia Power was sole wholesale supplier of electric power to 50 municipal and 40 co-operative customers. However, the scene changed dramatically over 20 years ago. Georgia Power lost its monopoly power over transmission in Georgia as a result of a settlement of litigation before the United States Atomic Energy Commission (AEC) of antitrust issues in proceedings relating to Georgia Power's applications for licenses to construct and operate nuclear-fueled Plants Hatch and Vogtle.[7] As a result of the settlement, Georgia Power's wholly dependent wholesale customers obtained ownership interests as tenants in common in four generating plants including nuclear fueled Plants Hatch and

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[7] For a recital of the litigation before the AEC and the terms and conditions of the settlement see Greensboro Lumber Co. v. Georgia Power Co., 643 F. Supp. 1345, 1351 (N.D. Ga. 1986), aff'd, Greensboro Lumber Co. v. Georgia Power Co., 844 F.2d 1538 (11th Cir. 1988).

Vogtle and coal-fired Plants Wansley and Scherer, and ownership interests in segments of the Georgia ITS proportionate to their use of the transmission grid. The integrated high voltage electric transmission system in Georgia (Georgia ITS) because owned in segments by Georgia Power (a public utility regulated by FERC), the City of Dalton and two other non-jurisdictional utilities.[8] The relations between the owners have been and are governed by Integrated Transmission System Agreements (ITSAs) filed with, and approved by, FERC. See Georgia Power Co., 57 FERC ¶61,087 at 61,315 (1991), reh'g granted, 57 FERC ¶61,353 (1991). Georgia Power cannot operate the transmission lines it owns without utilizing the integrated lines owned by the non-jurisdictional utilities.

The settlement in the nuclear cases so enhanced competitive conditions on the Georgia ITS that an antitrust suit brought against the owners of the system by the owner of a non-jurisdictional co-generation unit seeking service through the Georgia ITS was dismissed in Greensboro Lumber, the District Court stating:

> The Settlement [in the nuclear cases] itself was reviewed by the Department of Justice which opined that partial ownership of the Hatch and Vogtle Plants by MEAG, Oglethorpe and Dalton would not create or maintain a situation inconsistent with the antitrust laws. Moreover, the Justice Department concluded that the partial ownership arrangement as well as the purchase and ownership by Oglethorpe, MEAG and Dalton of portions of the high

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[8] The other two non-public utilities are Municipal Electric Authority of Georgia (MEAG) and Georgia Transmission Corporation (Georgia Transmission).

> voltage transmission grid previously owned by Geogia Power would have a pro-competitive effect in the electrical services market because they would provide actual and potential competitors of Georgia Power with viable alternative power supply sources which would, consequently, enable them to compete effectively with Georgia Power.

643 F. Supp. at 1353. The court further found that "[p]articipation in the ITS enables the parties to coordinate the development of their transmission facilities, makes unnecessary the construction of duplicate facilities, and, in general, provides an opportunity for achieving economies of scale." Id. at 1354.

4. The Court of Appeals states in TAPS that Chevron governed the Commission's interpretation of sections 205 and 206. NY App. C-19. Nonetheless, the court's opinion reflects no Chevron review of the language of the first prong of section 206 in assessing Dalton's criticisms of the lack of record evidence to support a finding of undue discrimination. Nowhere did the court address the question whether the statutory meaning is clear. Had it done so, it would have had to come to grips with the present tense description of the activities forbidden. See FPC v. Sierra Pacific Power Co., 350 U.S. at 353. Only if the court had found that the statute was silent or the statutory meaning ambiguous could it have applied Chevron to the Commission's interpretation of these terms in the statute. 467 U.S. at 842 ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." (footnote omitted)

5. The Commission's attempt to justify its use of generic findings of undue discrimination on the basis of its decisions in Wisconsin Gas and AGD is misplaced. As demonstrated above, neither case involved a finding of unlawful practices based on a utility's potential to engage in unlawful activities. Both decisions were based on generic findings of actual unlawful activities.

a) Wisconsin Gas arose from a rulemaking under section 5(a) of the NGA. The Commission analyzed the legality of contract and tariff provisions in widespread use in the industry which were voluntarily on file with the Commission. In the court's words: "These contracts and tariffs often contain minimum commodity bills (or minimum bills) and minimum take provisions." 770 F.2d at 1149. The Commission "held that the collection of variable costs through the minimum bills represented an 'unjust and unreasonable' rate under sections 4 and 5" of the NGA. Id. at 1151. The Court found that the Commission's factual support for its generic finding that the minimum bills permit pipelines "the recovery of variable costs not incurred" is "unassailable." Id. at 1157.

b) Nor does AGD support the Commission's reliance in Order 888 on generic findings of systemic monopoly conditions and the resulting potential for anti-competitive behavior. AGD involved orders based, in the Court's words, on a Commission finding that "a prevailing pipeline practice - particularly their general refusal to transport gas for third parties where to do so would displace their own sales (Joint Appendix ('J.A.') 318-19) - has caused serious market distortions. It has found this practice 'unduly discriminatory' within the meaning of §5 of the NGA." 824 F.2d at 993-94. The court summarized the Commission's basic findings in these terms:

> (1) Despite the growth of a competitive wellhead market, the interstate pipelines retain market power in gas transportation. J.A. 306. (2) Pipelines have generally declined to transport gas in competition with their own sales (except for transportation to customers that can switch to alternative fuels at little or no extra cost). J.A. 318-19. (3) Pipeline discrimination in transportation has denied consumers access to gas at the lowest reasonable rates. J.A. 320, 352.

Id. at 996. The Court found that the pipelines did not in fact challenge these factual findings on appeal. Id. at 1000.

A comparison of the order considered in AGD with Order 888 demonstrates that the order in AGD was based on findings that the pipelines were actually engaged in practices which the Commission found unlawful, while Order 888 is based on quite different findings that the public utilities have the potential to engage in unlawful practices. Order 888 may be more thoroughly documented, as the Court of Appeals remarks, NY App. C-22, but the additional pages only multiply allegations, rather than provide record support for findings of actual unlawful practices. The court below properly found that Order 888 was not based on a finding that any public utility was or is actually engaged in undue discrimination.

c) The order involved in AGD is distinguishable from Order 888 on a second ground. The involuntary open access transportation"remedy" imposed by the Commission under the orders involved in AGD did not apply to all pipelines. The remedy applied only to those pipelines which voluntarily requested that the Commission issue them a blanket certificate of public convenience and necessity authorizing transportation,

instead of utilizing the more time-consuming and more expensive process of seeking a certificate of public convenience and necessity for each individual project. 824 F.2d at 996.

6. Section 206(a) requires that the Commission act "after a hearing." Dalton did not and does not challenge the Commission's use of notice-and-comment rulemaking procedures in developing the record in this case. Dalton does not assert that the Commission was obliged to act on the basis of an adjudication or on a case-by-case basis. What Dalton does claim is that the record developed does not support a generic finding of illegality under section 206(a). The Commission admitted as much when it stated: "Many of the examples of discriminatory behavior that have been brought to our attention do not name the specific utilities involved, and many are allegations that are not proven." App. A at 55a. In order to perform adequately its statutory obligation to provide the essence of a hearing, the Commission should have apprized the affected public utilities as to which of the multitude of allegedly unduly discriminatory activities was currently charged against them and afforded each a reasonable opportunity to respond, because not every difference in treatment but only "undue" discrimination is unlawful under the FPA. Wisconsin Gas provides a precedent for such a procedure. In that case, the contract and tariff provisions of the natural gas pipelines being scrutinized were identifiable on the public record. The pipelines had an opportunity to rebut, but chose not to challenge seriously the Commission's findings of fact. 770 F.2d at 1158. In AGD no one challenged the basic factual findings supporting the Commission's generic finding of undue discrimination. By contrast, public utilities did object to the Commission's reliance in Order 888 on allegations of undue discrimination. The Commission on rehearing disclaimed in Order 888-A that it had made any findings of undue discrimination on the part of any public utility. App. B. at 87a-88a.

The notice-and-comment procedure preceding Order 888 did not rise above the level of an investigation. The voluminous record simply does not support generic findings of existing practices affecting public utility rates, charges or classifications which are unduly discriminatory under section 206(a).

POINT II

THE COMMISSION LACKED AUTHORITY UNDER SECTION 206(a) TO ORDER PUBLIC UTILITIES TO ENGAGE IN INVOLUNTARY WHEELING

1. The Court of Appeals recognized that if the Supreme Court's Otter Tail decision dictated a particular construction of the Commission's authority to order involuntary transmission under sections 205 and 206, then the Commission's contrary interpretation would not be entitled to Chevron deference. NY APP. C-19. But Otter Tail does effectively dictate a construction of section 206(a) contrary to that of the Commission. Under the circumstances, the lower court should have "adhere[d] to that determination under the doctrine of stare decisis," and judged the Commission's "later interpretation of the statute against [the Supreme Court's] prior determination of the statute's meaning." Maislin 497 U.S. at 131. Instead, the court concluded that its prior decision in AGD controlled the disposition of the issue, stating: "while Otter Tail may represent a general rule that FERC's authority to order open access is limited, the FPA, like the NGA, makes an exception to that rule where FERC finds undue discrimination." NY App. C-19. AGD "controlled," in the court's opinion, because in the natural gas case the Commission "reasonably interpreted the NGA's ambiguous anti-discrimination provisions as giving it

broad authority to remedy unduly discriminatory behavior through a generic open access requirement." Id.

2. The AGD decision under the NGA cannot control the legality of a generic involuntary open access transmission order under the FPA. AGD did not involve a remedial order compelling all pipelines to provide open access transportation service. AGD involved the review of Commission Order 436, 50 Fed. Reg. 42,408 (1985), which provided that if a pipeline sought "to take advantage of 'blanket certification' of transportation [under section 7 of the NGA] (i.e., a certificate authorizing transportation services generically and thus obviating the need for unwieldy individual certification), it must commit itself to provide transportation on a non-discriminatory basis (and thus become an 'open-access' pipeline)." 824 F.2d at 996. Several pipelines attacked this condition as beyond the scope of the Commission's authority under the NGA and Natural Gas Policy Act to require common carriage. 824 F.2d at 997. They based their argument on Otter Tail and decisions in electric cases under the FPA on the premise that the Federal Power Act established a regulatory scheme for electricity paralleling that which the NGA created for gas. The pipelines sought to demonstrate that the Commission could not impose common carriage duties indirectly under the NGA which the statute prevented it from imposing directly. The Court of Appeals rejected the argument that precedents demonstrating the Commission's lack of authority to order involuntary transmission under the FPA were controlling in a review of orders under the NGA. The court held that petitioners there read certain of the electric precedents too broadly, stating:

> First, we note that the legislative history of the two acts is, on this point, materially different. In its deliberations on the bill that ultimately emerged as the Federal Power Act, Congress

> considered and rejected a provision that would have "empowered the Federal Power Commission to order wheeling if it found such action to be 'necessary or desirable in the public interest.'" Otter Tail Power Co. v. United States, 410 U.S. 366, 374, 93 S. Ct. 1022, 1028, 35 L. Ed. 359 (1973) (quoting S.1725, 74th Cong., 1st Sess.). The evidence as to the NGA (surveyed above) is less direct: it consists exclusively of various occasions on which Congress did not adopt proposals actually making the natural gas pipelines into common carriers.

824 F.2d at 998-999.

AGD involved an exercise of the Commission's authority to attach reasonable conditions to certificates of public convenience and necessity issued under section 7 of the NGA. There is no similar provision in the FPA. Congress left the construction of high voltage transmission lines to regulation by the States under section 201(a) of the FPA, 16 U.S.C. §824(a).

3. Otter Tail requires rejection of the Commission's interpretation of its authority to order involuntary transmission of energy under section 206(a). That case involved a civil antitrust suit in which the District Court has found that the public utility (Otter Tail) had attempted to monopolize and had monopolized the retail distribution of electric power in its service area in violation of section 2 of the Sherman Act. 26 Stat. 209 as amended, 15 U.S.C. §2. Otter Tail had attempted to prevent communities which it had served at retail from replacing its distribution operations with a municipal distribution system. Among the principal means employed were "refusals to 'wheel' power to such systems, that is to say, to transfer by direct transmission or displacement electric power from one

utility to another over the facilities of an intermediate utility". 410 U.S. at 368. Otter Tail contended that because of the FPA it was not subject to antitrust regulation with respect to its refusal to provide access to its transmission system. The Federal Power Commission took the unusual step of opposing the Department of Justice by filing a brief amicus curiae in support of Otter Tail. The Commission interpreted "its authority to order interconnection, 16 U.S.C. §824a, as a grant of exclusive jurisdiction in matters involving interconnections." 410 U.S. at 392, n. 8 (Justice Stewart with the Chief Justice and Justice Rehnquist, concurring in part and dissenting in part). This Court rejected the arguments of both Otter Tail and the Commission.

This Court found it necessary in Otter Tail to review the legislative history of the FPA, as no provision of the Act specifically granted the Commission authority to compel involuntary wheeling. This Court concluded:

> So far as wheeling is concerned, there is no authority granted the Commission under Part II of the Federal Power Act to order it, for the bills originally introduced contained common carrier provisions which were deleted. The Act as passed contained only the interconnection provision set forth in §202(b). The common carrier provision in the original bill and the power to direct wheeling were left to the "voluntary coordination of electric facilities." (footnotes omitted)

410 U.S. at 375-76. No subsequent amendment of the FPA warrants a different conclusion.

4. The Commission sought to justify its generic remedial ruling on the fact that there has been in recent years an increase in competition in the wholesale of electric energy brought about by the entry of new participants in the generation business. App. A at 2a-17a. Much credit for this development can be given to Congress which enacted (a) the Public Utilities Regulatory Policies Act (PURPA) in 1978[9] authorizing the construction of alternative generation sources as a means of reducing the demand for traditional fossil fuels, and (b) Title VII of the Energy Policy Act of 1992[10] promoting greater competition in bulk power markets by encouraging new generation entrants. See App. A at 9a-10a, 15a. Obviously conscious of what it was doing, Congress expanded the Commission's jurisdiction over transmission at the same time, but in more measured steps. While PURPA granted the Commission some additional authority to compel wheeling, it did not authorize an order compelling wheeling under section 206(a). See New York State Electric & Gas Corp. v FERC, 638 F.2d 388, 403 (2nd Cir. 1980), cert. denied, 454 U.S. 821 (1981). Whereas the Energy Policy Act of 1992 amended section 211 of the FPA to enable the Commission to order involuntary wholesale transmission as a remedy to undue discrimination, the Commission could act only in response to a complaint, after affording an opportunity for an evidentiary hearing, and only if such action was in the public interest and would not unreasonably impair the reliability of service. These legislative changes fall far short of the Commission's perceived need for authority to issue a

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[9] Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified in U.S.C. sections 15, 16, 26, 30, 42 and 43).

[10] Pub. L. No. 102-486, 106 Stat. 2776 (1992), codified at, among other places, 15 U.S.C. §79z-5A and 16 U.S.C. 796 (22-25), §824i-1.

generic order compelling the industry to provide involuntary transmission.

CONCLUSION

For the foregoing reasons, the Court is respectfully urged to grant this Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, and reverse its decision in Transmission Access Policy Study Group, et al. v. FERC, 225 F.3d 667 (D.C. Cir. 2000) as to the issues raised herein.

Respectfully submitted,

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Dated: November 20, 2000
Washington, D.C.

APPENDIX

APPENDIX A

Extracts from Order 888

61 F.R. 21540 (May 10, 1996)

18 CFR Parts 35 and 385

[Docket Nos. RM95-8-000 and RM94-7-001; Order No. 888]

FERC Stats. & Regs. ¶31,036

Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities.

Issued April 24, 1996

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

* * *

III. Background

In the NOPR, we set out a detailed statement of the events leading up to this rulemaking. We repeat that background here, updated to reflect what has happened since March 1995, and discuss why it is necessary to undertake regulatory reform in the electric industry at this time. We do so to provide the necessary backdrop to our action in adopting this Rule.

A. *Structure of the Electric Industry at Enactment of Federal Power Act*

The Federal Power Act was enacted in an age of mostly self-sufficient, vertically integrated electric utilities, in which generation, transmission, and distribution facilities were owned

by a single entity and sold as part of a bundled service (delivered electric energy) to wholesale and retail customers. Most electric utilities built their own power plants and transmission systems, entered into interconnection and coordination arrangements with neighboring utilities, and entered into long-term contracts to make wholesale requirements sales (bundled sales of generation and transmission) to municipal, cooperative, and other investor-owned utilities (IOUs) connected to each utility's transmission system. Each system covered limited service areas. This structure of separate systems arose naturally due primarily to the cost and technological limitations on the distance over which electricity could be transmitted.

Through much of the 1960s, utilities were able to avoid price increases, but still achieve increased profits, because of substantial increases in scale economies, technological improvements, and only moderate increases in input prices.[6] Thus, there was no pressure on regulatory commissions to use regulation to affect the structure of the industry.[7]

B. *Significant Changes in the Electric Industry*

In the late 1960s and throughout the 1970s, a number of significant events occurred in the electric industry that changed the perceptions of utilities and began a shift to a more competitive marketplace for wholesale power.[8] This was the beginning of periods of rapid inflation, higher nominal interest

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[6] Paul L. Joskow, Inflation and Environmental Concern: Structural Change in the Process of Public Utility Regulation, 17 J. Law & Econ. 291, 312 (1974); *see also* Charles F. Phillips, Jr., *The Regulation of Public Utilities* 11 (1988).

[7] *See* Joskow, *supra* at p. 312; *see also* Phillips, *supra* at p. 12.

[8] *See* Joskow, *supra* at p. 312; *see also* Phillips, *supra* at pp. 12-13.

rates, and higher electricity rates.[9] During this time, consumers became concerned about higher electricity rates and questioned any price increases filed by utilities.[10]

During this same time frame, the construction of nuclear and other capital-intensive baseload facilities—actively encouraged by federal and some state governments—contributed to the continuing cost increases and uncertainties in the industry.[11] These investments were made based on the assumptions that there would be steady increases in the demand for electricity and continued large increases in the price of oil.[12] However, due to conservation and economic downturns, the expected demand increases did not materialize. Load growth virtually disappeared in some areas, and many utilities unexpectedly found themselves with excess capacity.[13] In addition, by the 1980s, the oil cartel collapsed, with a resulting glut of low-priced oil.[14] At the same time, inflation substantially increased the costs of these large baseload

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[9] *See* Joskow, *supra* at pp. 312-13; *see also* Phillips, *supra* at p. 13. The Arab oil embargo resulted in significantly higher oil prices through the 1970s. *See* Richard J. Pierce, Jr., The Regulatory Treatment of Mistakes in Retrospect: Canceled Plants and Excess Capacity, 132 U. Pa. L. Rev. 497, 501 (1984).

[10] *See* Joskow, *supra* at p. 313; *see also* Phillips, *supra* at p. 13.

[11] *See generally Jersey Central Power & Light Company v. FERC*, 810 F.2d 1168, 1171 (D.C. Cir. 1987).

[12] *Id.*

[13] *See* Pierce, *supra* at p. 503. By 1983, the Department of Energy had estimated that the sunk costs for canceled nuclear plants alone amounted to $10 billion. *Id.* at p. 498.

[14] *Id.*

generating plants.[15] Surging interest rates further increased the cost of the capital needed to finance and capitalize these projects and completion schedules were significantly extended by, in part, more stringent safety and environmental requirements.[16]

As a result, expensive large baseload plants for which there was little or no demand, came onto the market or were in the process of being constructed. Accordingly, between 1970 and 1985, average residential electricity prices more than tripled in nominal terms, and increased by 25% after adjusting for general inflation.[17] Moreover, average electricity prices for industrial customers more than quadrupled in nominal terms over the same period and increased 86% after adjusting for inflation.[18] The rapidly increasing rates for electric power during this period, together with the opportunities provided by the Public

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[15] *See* Bernard S. Black & Richard J. Pierce, Jr., The Choice Between Markets and Central Planning in Regulating the U.S. Electricity Industry, 93 Col. L. Rev. 1339, 1346 (1993) ("Actual costs of nuclear power plants vastly exceeded estimates, sometimes by as much as 1000%.").

[16] *See* Phillips, *supra* at p. 13. Fossil fuel-fired plants became subject to increased regulation as a result of the Clean Air Act of 1970, and its 1977 amendments. 42 U.S.C. §§7401-7642. In 1971, nuclear plant licensing became subject to the environmental impact statement requirements of the National Environmental Policy Act of 1969. 42 U.S.C. § 4332. Following the 1979 accident at the Three Mile Island nuclear plant, nuclear plants also became subject to additional safety regulations, resulting in higher costs. *See* Energy Information Administration, *The Changing Structure of the Electric Power Industry 1970-1991* (March 1993) 35. Between 1976 and 1980, most states and many localities instituted laws governing power plant siting.

[17] Based on retail prices reported in Energy Information Administration (EIA), Monthly Energy Review, January 1995, Table 9.9 (Prices adjusted for inflation using the GDP Deflator (1987 = 100)).

[18] *Id.*

Utility Regulatory Policies Act of 1978 (PURPA) (discussed infra), also prompted some industrial customers to bypass utilities by constructing their own generation facilities. This further exacerbated rate increases for remaining customers—primarily residential and commercial customers.

Consumers responded to these "rate shocks" by exerting pressure on regulatory bodies to investigate the prudence of management decisions to build generating plants, especially when construction resulted in cost overruns, excess capacity, or both. Between 1985 and 1992, writeoffs of nuclear power plants totalled $22.4 billion.[19] These writeoffs significantly reduced the earnings of the affected utilities.[20] Delays in obtaining rate increases to reflect the effects of inflation further reduced investor returns. Thus, many utilities became reluctant to commit capital to long-term construction decisions involving large scale generating plants.[21]

In addition to economic changes in the industry, significant technological changes in both generation and transmission have occurred since 1935. Through the 1960s, bigger was cheaper in the generation sector and the industry was able to capitalize on economies of scale to produce power at lower per-unit costs from larger and larger plants.[22] As a result, large utility companies that could finance and manage construction projects

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[19] *See* Black & Pierce, *supra* at p. 1346 (These writeoffs were "about 17% of the book value of total 1992 utility investment.").

[20] *Id.*

[21] *Id.* ("The high perceived risk of future disallowances reversed utilities' incentives to overinvest, and made utilities extremely reluctant to build new power plants.").

[22] *See* Preston Michie, Billing Credits for Conservation, Renewable, and Other Electric Power Resources: an Alternative to Marginal-Cost-Based Power Rates in the Pacific Northwest, 13 Environmental Law 963, 964-65 (1983).

of larger scale had a price advantage over smaller utility companies and customers who might otherwise have considered building their own generating units. Scale economies encouraged power generation by large vertically-integrated utility companies that also transmitted and distributed power. Beginning in the 1970s, however, additional economies of scale in generation were no longer being achieved.[23] A significant factor was that larger generation units were found to need relatively greater maintenance and experience longer downtimes.[24] The electric industry faced the situation "where the price of each incremental unit of electric power exceeded the average cost."[25] Bigger was no longer better.

Further dictating against larger generation units were advances in technologies that allowed scale economies to be exploited by smaller size units, thereby allowing smaller new plants to be brought on line at costs below those of the large plants of the 1970s and earlier. Such new technologies include combined cycle units and conventional steam units that use circulating fluidized bed boilers.[26]

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[23] *Id.* at p. 965.

[24] Energy Information Administration, *The Changing Structure of the Electric Power Industry 1970-1991* (March 1993) 37 ("As larger units were constructed, however, utilities discovered that downtime was as much as 5 times greater for units larger than 600 megawatts than for units in the 100-megawatt range.")

[25] *Id.*; *see also* George A. Perrault, Downsizing Generation: Utility Plans for the 1990s, Pub. Util. Fort. 15-16 (Sept. 27, 1990) ("The large base-load generating units that form the backbone of utility systems are almost totally absent from capacity plans for the 1990s.").

[26] "From 1982 through 1991, the average capacity of fluidized-bed units increased rapidly to 72 megawatts for 4 units in 1991. The average capacity for the 19 units planned to begin operating in 1992 through 1995 increases to 83 megawatts." Energy Information Administration, *The Changing Structure of the Electric Power Industry 1970-1991* (March 1993) 38.

The combined cycle generating plants generally use natural gas as their primary fuel. This technology has been made possible by the development of more efficient gas turbines, shorter construction lead times, lower capital costs, increased reliability, and relatively minimal environmental impacts.[27] Similarly, the circulating fluidized bed combustion boilers, fueled by coal and other conventional fuels, provide a more efficient and less polluting resource.

Today, "the optimum size (of generation plants) has shifted from (more than 500 MW) (10-year lead time) to smaller units (one-year lead time) (in the 50- to 150-MW range)."[28] Indeed, smaller and more efficient gas-fired combined-cycle generation facilities can produce power on the grid at a cost ranging from 5 cents per kWh to less than 3 cents per kWh.[29] This is significantly less than the costs for large plants constructed and installed by utilities over the last decade, which were typically in the range of 4 to 7 cents per kWh for coal plants and 9 to 15 cents for nuclear plants.[30] Significant changes have also

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[27] *See* Charles E. Bayless, Less is More: Why Gas Turbines Will Transform Electric Utilities, Pub. Util. Fort. (Dec. 1, 1994) 21.

[28] *Id.* at p. 24. *See also* Wallace E. Brand, Is Bigger Better? Market Power in Bulk Power Supply: From FDR to NOPR, Pub. Util. Fort. (Feb. 15, 1996) 23 at p. 25 (while the optimal baseload unit size is about 500 MW for coal-fired steam turbines, the optimal size for gas fired combined-cycle units is about 150 to 200 MW).

[29] FERC staff calculations based in part on combined-cycle plant cost data reported in 1994 FERC Form No. 1 for a sample of units placed in service during 1990-94. Costs vary with regional fuel and construction costs, among other reasons.

[30] Coal and Nuclear plant cost data reported in 1994 FERC Form No. 1 and the EIA report, *Electric Plant Cost and Power Production Expenses 1991,* 1993 DOE/EIA-0455(91), for plants placed in service during 1986-94; *see also* The 1994 Electric Executives' Forum, Bakke (President and CEO of the AES Corporation), Pub. Util. Fort. (June 1,

occurred in the transmission sector of the industry. Technological advances in transmission have made possible the economic transmission of electric power over long distances at higher voltages.[31] This has made it technically feasible for utilities with lower cost generation sources to reach previously isolated systems where customers had been captive to higher cost generation. In addition, the nature and magnitude of coordination transactions[32] have changed dramatically since enactment of the FPA, allowing increased coordinated operations and reduced reserve margins. Substantial amounts of electricity now move between regions, as well as between utilities in the same region. Physically isolated systems have become a thing of the past.

C. *The Public Utility Regulatory Policies Act and the Growth of Competition*

In enacting PURPA,[33] Congress recognized that the rising costs and decreasing efficiencies of utility-owned generating facilities were increasing rates and harming the economy as a

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1994) 45 ("New generation can be built at about 3 cents per kilowatt-hour (U.S. average). Old generation costs about twice that * * * ").

[31] *See* Black & Pierce, *supra* at p. 1345 (In the late 1960s and 1970s, improved transmission efficiency and development of regional transmission networks "made it possible to build power plants up to 1000 miles from power users.").

[32] Coordination transactions are voluntary sales or exchanges of specialized electricity servi[illegible] that allow buyers to realize cost savings or reliability gains that are n[illegible]ttainable if they rely solely on their own resources. For sellers, these transactions provide opportunities to earn additional revenue, and to lower customer rates, from capacity that is temporarily excess to native load capacity requirements.

[33] Pub. L. No. 95-617, 92 Stat. 3117 (codified in U.S.C. sections 15, 16, 26, 30, 42, and 43).

whole.[34] To lessen dependence on expensive foreign oil, avoid repetition of the 1977 natural gas shortage, and control consumer costs, Congress sought to encourage electric utilities to conserve oil and natural gas.[35] In particular, Congress sanctioned the development of alternative generation sources designated as "qualifying facilities" (QFs) as a means of reducing the demand for traditional fossil fuels.[36] PURPA required utilities to purchase power from QFs at a price not to exceed the utility's avoided costs and to sell backup power to QFs.[37]

PURPA specifically set forth limitations on who, and what, could qualify as QFs. In addition to technological and size

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[34] *See generally FERC v. Mississippi,* 456 U.S. 742, 745-46 (1982).

[35] The Power Plant and Industrial Fuel Use Act of 1978. Pub. L. No. 95-617, 92 Stat. 3117 (codified in U.S.C. sections 15, 16, 26, 30, 42, and 43).

[36] QFs include certain cogenerators and small power producers. PURPA also added sections 210, 211, and 212 to the FPA, providing the Commission with authority to approve applications for interconnections and, in limited circumstances, wheeling. However, under section 211, as enacted in PURPA, the Commission could approve an application for wheeling only if it found, inter alia, that the order "would reasonably preserve existing competitive relationships." Because of this and other limitations in sections 211 and 212 as originally enacted, the provision was virtually ineffective. Only one section 211 order was ever issued pursuant to the original provision, and it was pursuant to a settlement. *See Public Service Company of Oklahoma,* 38 FERC ¶ 61,050 (1987). As discussed *infra,* section 211 was subsequently revised by the Energy Policy Act of 1992.

[37] 456 U.S. at 750. Congress recognized that encouragement was needed in part because utilities had been reluctant to purchase electric power from, and sell power to, nonutility generators. *Id.* at pp. 750-51.

criteria, PURPA set limits on who could own QFs.[38] Notwithstanding these limitations, QFs proliferated. In 1989, there were 576 QF facilities. By 1993, there were more than 1,200 such facilities.[39] For the same time period, installed QF capacity increased from 27,429 megawatts to 47,774 megawatts.[40] The rapid expansion and performance of the QF industry demonstrated that traditional, vertically integrated public utilities need not be the only sources of reliable power.

During this period, the profile of generation investment began to change, and a market for non-traditional power supply beyond the purchases required by PURPA began to emerge. QFs were limited to cogenerators and small power producers.[41]

However, other non-traditional power producers who could not meet the QF criteria began to build new capacity to

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[38] For example, PURPA provided that a cogeneration facility or small power production facility could not be owned by a person primarily engaged in the generation or sale of electric power (other than from cogeneration or small power production facilities). *See* 16 U.S.C.

[39] Energy Information Administration, *Electric Power Annual 1993* (December 1994) 124 (Table 77).

[40] *Id.* EIA data for 1989 through 1991 was for facilities of 5 megawatts or more and for 1992 and 1993 was for facilities of 1 megawatt or more. A comparison with Table 74 on page 121 for the years 1992 and 1993 reveals that this mixing of data bases is likely of minimal effect.

[41] Generally, the law has imposed an 80 MW cap on small power producers. A limited exception enacted in 1990 permitted small power facilities that could exceed 80 MW and still qualify as QFs under PURPA. This exception was limited to certain solar, wind, waste, and geothermal small power production facilities and only covered applications for certification of facilities as qualifying small power production facilities that were submitted no later than December 31, 1994 and for which construction commences no later than December 31, 1999. See Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990, Pub. L. No. 101-575, 104 Stat. 2834 (1990), *amended*, Pub. L. No. 102-46, 105 Stat. 249 (1991).

compete in bulk power markets, without such PURPA benefits as the mandatory purchase requirements. These producers, known as independent power producers (IPPs), were predominantly single-asset generation companies that did not own any transmission or distribution facilities. While traditional utilities were generally reluctant at that time to invest in new generating facilities under cost of service regulation, utilities increasingly became interested in participating in this new generation sector. They organized affiliated power producers (APPs), with assets not included in utility rate base, and sought to sell power in their own service territories and the territories of other utilities. At the same time, power marketers arose. These entities—owning no transmission or generation—buy and sell power.[42]

There were two major impediments to the development of IPPs and APPs. First, the ownership restrictions of the Public Utility Holding Company Act (PUHCA)[43] severely inhibited these new entities from entering the generation business.[44] Second, these entities needed transmission service in order to compete in electricity markets.

While the Commission had no authority to remove PUHCA restrictions,[45] it encouraged the development of IPPs

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[42] The first power marketer in the electric industry was Citizens Energy Corporation. *See Citizens Energy Corporation*, 35 FERC ¶ 61,198 (1986). Power marketers take title to electric energy. Power brokers, on the other hand, do not take title and are limited to a matchmaking role.

[43] 15 U.S.C.¶ 79 *et seq.*

[44] As discussed *infra*, Congress eventually provided a means to avoid the PUHCA restrictions by creating exempt wholesale generators (EWGs) in the Energy Policy Act.

[45] The industry was successful to some extent in developing ownership structures that permitted such investment. *See, e.g., Commonwealth Atlantic Limited Partnership*, 51 FERC ¶ 61,368 at p. 62,240 and n.20 (1990).

and APPs, as well as emerging power marketers, by authorizing market-based rates for their power sales on a case-by-case basis and by encouraging more widely available transmission access. From 1989 through 1993, facilities owned by IPPs and other non-traditional generators (other than QFs) increased from 249 to 634 and their installed capacity increased from 9,216 megawatts to 13,004 megawatts.[46] Indeed, "[i]n 1992, for the first time, generating capacity added by independent producers exceeded capacity added by utilities."[47]

Market-based rates helped to develop competitive bulk power markets. A generating utility allowed to sell its power at market-based rates could move more quickly to take advantage of short-term or even long-term market opportunities than those laboring under traditional cost-of-service tariffs, which entail procedural delays in achieving tariff approvals and changes.

In approving these market-based rates, the Commission required, inter alia, that the seller and any of its affiliates lack market power or mitigate any market power that they may have possessed.[48] The major concern of the Commission was whether the seller or its affiliates could limit competition and thereby drive up prices. A key inquiry became whether the seller or its affiliates owned or controlled transmission facilities in the relevant service area and therefore, by denying access or imposing discriminatory terms or conditions on transmission

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[46] Energy Information Administration, *Electric Power Annual 1993* (December 1994) 124 (Table 77).

[47] Black & Pierce, *supra* at p. 1349 n.25.

[48] *See, e.g., Ocean State Power,* 44 FERC ¶ 61,261 (1988); *Commonwealth Atlantic Limited Partnership,* 51 FERC ¶ 61,368 (1990); *Citizens Power & Light Company,* 48 FERC ¶ 61,210 (1989); *Orange and Rockland Utilities, Inc.,* 42 FERC ¶ 61,012 (1988); *Doswell Limited Partnership,* 50 FERC ¶ 61,251 (1990) *(Doswell);* and *Dartmouth Power Associates Limited Partnership,* 53 FERC ¶ 61,117 (1990).

service, could foreclose other generators from competing.[49] As we have previously explained:

> The most likely route to market power in today's electric utility industry lies through ownership or control of transmission facilities. Usually, the source of market power is dominant or exclusive ownership of the facilities. However, market power also may be gained without ownership. Contracts can confer the same rights of control. Entities with contractual control over transmission facilities can withhold supply and extract monopoly prices just as effectively as those who control facilities through ownership.[50]

As entry into wholesale power generation markets increased, the ability of customers to gain access to the transmission services necessary to reach competing suppliers became increasingly important.[51] In addition, beginning in the

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[49] *See, e.g., Doswell*, 50 FERC at p. 61,757.

[50] *Citizens Power & Light Corporation*, 48 FERC ¶ 61,210 at p. 61,777 (1989) (emphasis in original); *see also Utah Power & Light Company, PacifiCorp and PC/UP&L Merging Corporation*, 45 FERC ¶ 61,095 at pp. 61,287-89 (1988), *order on reh'g*, 47 FERC ¶ 61,209, *order on reh'g*, 48 FERC ¶ 61,035 (1989), *remanded in part sub nom. Environmental Action, Inc. v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991), *order on remand*, 57 FERC ¶ 61,363 (1991).

[51] In earlier years, a few customers were able to obtain access as a result of litigation, beginning with the Supreme Court's decision in *Otter Tail Power Company v. United States*, 410 U.S. 366 (1973). Additionally, some customers gained access by virtue of Nuclear Regulatory Commission license conditions and voluntary preference power transmission arrangements associated with federal power marketing agencies. *See, e.g., Consumers Power Company*, 6 NRC 887, 1036-44 (1977) and *The Toledo Edison Company and Cleveland Electric Illuminating Company*, 10 NRC 265, 327-34 (1979). *See Florida Municipal Power Agency v. Florida Power and Light Company*, 839 F. Supp. 1563 (M.D. Fla. 1993). *See also* Electricity Transmission: Realities, Theory and Policy Alternatives, The Transmission Task Force Report to the Commission, October 1989, 197.

late 1980s, in order to mitigate their market power to meet Commission conditions, public utilities seeking Commission approval of mergers or consolidations under section 203 of the FPA or Commission authorization for blanket approval of market-based rates for generation services under section 205 of the FPA, filed "open access" transmission tariffs of general applicability.[52] The Commission applied its market rate analysis to IOUs, as well as IPPs, APPs, and marketers, and allowed IOUs to sell at market-based rates only if they opened their transmission systems to competitors.[53] The Commission also approved proposed mergers on the condition that the merging companies remedy anticompetitive effects potentially caused by the merger by filing "open access" tariffs. These early "open access" tariffs required only that the companies provide point-to-point transmission services, which is a much narrower requirement than that being imposed in this Rule and did not require transmission owners to provide to others the same quality of service that they themselves enjoyed.

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[52] *See, e.g., Public Service Company of Colorado*, 59 FERC ¶ 61,311 (1992), *reh'g denied*, 62 FERC ¶ 61,013 (1993); *Utah Power & Light Company, et al.*, Opinion No. 318, 45 FERC ¶ 61,095 (1988), *order on reh'g*, Opinion No. 318-A, 47 FERC ¶ 61,209 (1989), *order on reh'g*, Opinion No. 318-B, 48 FERC ¶ 61,035 (1989), *aff'd in relevant part sub nom. Environmental Action Inc. v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991); *Northeast Utilities Service Company (Public Service Company of New Hampshire)*, Opinion No. 364-A, 58 FERC ¶ 61,070, *reh'g denied*, Opinion No. 364-B, 59 FERC ¶ 61,042, *order granting motion to vacate and dismissing request for rehearing*, 59 FERC ¶ 61,089 (1992), *affirmed in relevant part sub nom. Northeast Utilities Service Company v. FERC*, 993 F.2d 937 (1st Cir. 1993).

[53] *See, e.g., Public Service of Indiana, Inc.*, 51 FERC ¶ 61,367 (1990), *reh'g denied*, 52 FERC ¶ 61,260 (1990), *appeal dismissed sub nom. Northern Indiana Public Service Company v. FERC*, 954 F.2d 736 (D.C.Cir. 1992).

Following PURPA, the economic and technological changes in the transmission and generation sectors helped give impetus to the many new entrants in the generating markets who could sell electric energy profitably with smaller scale technology at a lower price than many utilities selling from their existing generation facilities at rates reflecting cost. However, it became increasingly clear that the potential consumer benefits that could be derived from these technological advances could be realized only if more efficient generating plants could obtain access to the regional transmission grids. Because many traditional vertically integrated utilities still did not provide open access to third parties and still favored their own generation if and when they provided transmission access to third parties, barriers continued to exist to cheaper, more efficient generation sources.

D. *The Energy Policy Act*

In response to the competitive developments following PURPA, and the fact that PUHCA and lack of transmission access remained major barriers to new generators, Congress enacted Title VII of the Energy Policy Act of 1992 (Energy Policy Act).[54] A goal of the Energy Policy Act was to promote greater competition in bulk power markets by encouraging new generation entrants, known as exempt wholesale generators (EWGs), and by expanding the Commission's authority under sections 211 and 212 of the FPA to approve applications for transmission services.[55]

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[54] Pub. L. No. 102-486, 106 Stat. 2776 (1992), codified at, among other places, 15 U.S.C. §79z-5a and 16 U.S.C. 796 (22-25), §824j-l.

[55] *See El Paso Electric Company and Central and South West Services Inc.*, 68 FERC ¶ 61,181 at p. 61,914 (1994) (CSW); *see also* Paul Kemezis, FERC's Competitive Muscle: The Comparability Standard, Electrical World 45 (Jan. 1995) ("In EPAct, Congress made it clear that the electric-power industry was to move toward a fully competitive market system, but left most of the implementation to FERC.").

An EWG is defined as

Any person determined by the Federal Energy Regulatory Commission to be engaged directly, or indirectly through one or more affiliates as defined in [PUHCA] section 2(a)(11)(B), and exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale.[56]

If the Commission, upon an application, determines that a person is an EWG, that person will be exempt from PUHCA.[57] This provision removed a significant impediment to the development of IPPs and APPs by allowing them to develop projects as EWGs free from the strictures of PUHCA or the QF PURPA limitations.

While sections 211 and 212, as enacted by PURPA, were intended to provide greater access to the transmission grid, the limitations placed on these sections made them unusable in virtually all circumstances.[58] However, as amended by the Energy Policy Act, these sections now give the Commission broader authority to order transmitting utilities to provide wholesale transmission services, upon application, to any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale.

The Energy Policy Act also added section 213 to the FPA. Section 213(a) requires a transmitting utility that does not agree to provide wholesale transmission service in accordance with a good faith request to provide a written explanation of its proposed rates, terms, and conditions and its analysis of any

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[56] 15 U.S.C. §79z-5a.

[57] 15 U.S.C. §79z-5a(e).

[58] *See supra* note 36.

physical or other constraints.[59] Section 213(b) required the Commission to enact a rule requiring transmitting utilities to submit annual information concerning potentially available transmission capacity and known constraints.[60]

E. *The Present Competitive Environment*

Following the Energy Policy Act, the Commission established rules: (1) For certain generators to obtain EWG status and thus an exemption from PUHCA;[61] and (2) that required transmission information availability. The Commission also pursued a number of initiatives aimed at fostering the development of more competitive bulk power markets, including aggressive implementation of section 211, a new look at undue discrimination under the FPA, easing of

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[59] *See* Policy Statement Regarding Good Faith Requests for Transmission Services and Responses by Transmitting Utilities Under Sections 211(a) and 213(a) of the Federal Power Act, as Amended and Added by the Energy Policy Act of 1992, 58 FR 38964 (July 21, 1993), *FERC Statutes and Regulations* ¶ 30,975 (1993) (Policy Statement Regarding Good Faith Requests for Transmission Services).

[60] *See* New Reporting Requirements Implementing Section 213(b) of the Federal Power Act and Supporting Expanded Regulatory Responsibilities Under the Energy Policy Act of 1992, and Conforming and Other Changes to Form No. FERC-714, 58 FR 52420 (October 8, 1993), *FERC Statutes and Regulations* ¶ 30,980 (Order No. 558), *reh'g denied*, Order No. 558-A, 65 FERC ¶ 61,324 (1993), *regulations modified*, 59 FR 15333 (April 1, 1994), *FERC Statutes and Regulations* ¶ 30,993.

[61] *See* Order No. 550, Filing Requirements and Ministerial Procedures for Persons Seeking Exempt Wholesale Generator Status, 58 FR 8897 (February 18, 1993), *FERC Statutes and Regulations* ¶ 30,964, *order on reh'g*, Order No. 550-A, 58 FR 21250 (April 20, 1993), *FERC Statutes and Regulations* ¶ 30,969 (1993). As recognized by Congress and the Commission, availability of transmission information is critical in developing competitive markets. *See supra* notes 59 and 60. This opened the "black box" of information that previously was available only to transmission owners.

market entry for sellers of generation from new facilities, and initiation of a number of industry-wide reforms. As stated by the Commission, in recognition of the Congressional goal in the Energy Policy Act of creating competitive bulk power markets:

Our goal is to facilitate the development of competitively priced generation supply options, and to ensure that wholesale purchasers of electric energy can reach alternative power suppliers and vice versa.[62]

1. Use of Sections 211 and 212 to Obtain Transmission Access

The Commission has aggressively implemented sections 211 and 212 of the FPA, as amended by the Energy Policy Act, in order to promote competitive markets.[63] When wheeling requests under sections 211 and 212 have been made, the Commission has required wheeling in almost all of the requests it has processed. To date, the Commission has issued orders (proposed or final) requiring wheeling in 12 of the 14 cases it has acted on.[64]

As a general matter, section 211 has permitted some inroads to be made by customers in obtaining transmission service from public utilities that historically have declined to

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[62] *See* Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Notice of Proposed Rulemaking, 59 FR 35274 (July 11, 1994), *FERC Statutes and Regulations* ¶ 32,507 at p. 32,866 (Stranded Cost NOPR); *American Electric Power Service Corporation*, 67 FERC ¶ 61,168, *clarified*, 67 FERC ¶ 61,317 (1994).

[63] 16 U.S.C.A. §§ 824j-824k (West 1985 and Supp. 1994).

[64] *See, e.g.*, final orders issued in *City of Bedford*, 68 FERC ¶ 61,003 (1994), *reh'g denied*, 73 FERC ¶ 61,322 (1995); *Florida Municipal Power Agency v. Florida Power & Light Company*, 67 FERC ¶ 61,167 (1994), *order on reh'g*, 74 FERC ¶ 61,006 (1996); *Minnesota Municipal Power Agency*, 68 FERC ¶ 61,060 (1994); and *Tex-La Electric Cooperative of Texas*, 69 FERC ¶ 61,269 (1994); *see also* Appendix A.

provide access to their systems, or have offered service only on a discriminatory basis. Under section 211, the Commission has granted requests for the broader type of service that most utilities historically have refused to provide—network service. Although transmission owners have provided limited amounts of unbundled point-to-point transmission service, third-party customers have not been able to obtain the flexibility of service that transmission owners enjoy.

In Florida Municipal, a section 211 case, the Commission ordered "network," rather than the narrower "point-to-point," service.[65] Network service permits the applicant to fully integrate load and resources on an instantaneous basis in a manner similar to the transmission owner's integration of its own load and resources. At the same time, the Commission made the generic finding that the availability of transmission service will enhance competition in the market for power supplies and lead to lower costs for consumers. The Commission explained that as long as the transmitting utility is fully and fairly compensated and there is no unreasonable impairment of reliability, transmission service is in the public interest.[66]

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[65] *See Florida Municipal Power Agency v. Florida Power & Light Company*, 65 FERC ¶ 61,125, *reh'g dismissed*, 65 FERC ¶ 61,372 (1993), *final order*, 67 FERC ¶ 61,167 (1994), *order on reh'g*, 74 FERC ¶ 61,006 (1996). The Commission has "characterized point-to-point service as involving designated points of entry into and exit from the transmitting utility's system, with a designated amount of transfer capability at each point." *El Paso Electric Company v. Southwestern Public Service Company*, 68 FERC ¶ 61,182 at p. 61,926 n.9 (1994) (*citing Entergy Services, Inc.*, 58 FERC ¶ 61,234 at p. 61,768 (1993), *reh'g dismissed*, 68 FERC ¶ 61,399 (1994)). Network service allows more flexibility by allowing a transmission customer to use the entire transmission network to provide generation service for specified resources and specified loads without having to pay multiple charges for each resource-load pairing.

[66] *Florida Municipal*, 67 FERC at p. 61,477.

As discussed infra, based on the mounting competitive pressures in the industry and rapidly evolving markets, we have concluded that section 211 alone is not enough to eliminate undue discrimination. The comments received on the proposed rules, discussed in detail infra, confirm this conclusion. The significant time delays involved in filing an individual service request for bilateral service under section 211 place the customer at a severe disadvantage compared to the transmission owner and can result in discriminatory treatment in the use of the transmission system. It is an inadequate procedural substitute for readily available service under a filed non-discriminatory open access tariff. As the Commission noted in Hermiston Generating Company, "[t]he ability to spend time and resources litigating the rates, terms and conditions of transmission access is not equivalent to an enforceable voluntary offer to provide comparable service under known rates, terms and conditions."[67]

2. Commission's Comparability Standard

In the Spring of 1994, the Commission began to address the problem of the disparity in transmission service that utilities provided to third parties in comparison to their own uses of the transmission system. In the seminal case in this area, American Electric Power Service Corporation (AEP), the company voluntarily proposed a tariff of general applicability that would offer firm, point-to-point transmission service for a minimum of one month.[68] The Commission accepted the proposed transmission tariff for filing and suspended its effectiveness for

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[67] 69 FERC ¶ 61,035 at p. 61,165 (1994), *reh'g denied*, 72 FERC ¶ 61,071 (1995); *see also Southwest Regional Transmission Association*, 69 FERC ¶ 61,100 at p. 61,398 (1994), *order on compliance filing*, 73 FERC ¶ 61,147 (1995) (*SWRTA*).

[68] 64 FERC ¶ 61,279 (1993), *reh'g granted*, 67 FERC ¶ 61,168, *clarified*, 67 FERC ¶ 61,317 (1994).

one day, subject to refund.[69] Rehearing requests challenged the Commission's summary approval of the restriction of service to point-to-point as being discriminatory and anticompetitive.[70] The rehearing requests argued that the tariff should be expanded to include network services such as those used by the transmission owner. On rehearing, the Commission announced a new standard for evaluating claims of undue discrimination.

The Commission found that a voluntarily offered, new open access transmission tariff that did not provide for services comparable to those that the transmission owner provided itself was unduly discriminatory and anticompetitive.[71] In reaching that conclusion, the Commission broadened its undue discrimination analysis (which traditionally had focused on the rates, terms, and conditions faced by similarly situated third-party customers) to include a focus on the rates, terms, and conditions of a utility's own uses of the transmission system:

(A)n open access tariff that is not unduly discriminatory or anticompetitive should offer third parties access on the same or

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[69] The Commission explained that AEP could limit the service it was offering because it was "providing the service voluntarily under a tariff of general applicability." 64 FERC at p. 62,978.

[70] *AEP*, 67 FERC at p. 61,489.

[71] With respect to anticompetitive effects, the Commission explained that it has "adhered to the Supreme Court's determination that the Commission's 'important and broad regulatory power * * * carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to sections 202 and 203, and under like directives contained in sections 205, 206 and 207,' *Gulf States Utilities Company v. FPC*, 411 U.S. 747, 758-59 (1972)." *Id.* at p. 61,490 (footnote omitted). The Commission reaffirmed that it would examine how best to fulfill this responsibility, as well as its responsibility to prevent undue discrimination, in light of the changing conditions in the electric utility industry. *Id.*

comparable basis, and under the same or comparable terms and conditions, as the transmission provider's uses of its system.[72]

Refocusing the analysis was necessitated by the changing conditions in the electric utility industry, including the emergence of non-traditional suppliers and greater competition in bulk power markets. Because a transmission provider may use its system in different ways (e.g., to integrate load and resources when serving retail native load, to make off-system sales or purchases, or to serve wholesale requirements customers), the Commission set for hearing the factual issues associated with identifying those uses, as well as any potential impediments or consequences to providing comparable services to third parties.[73]

After AEP, the Commission applied this comparability standard to a proposed open access transmission tariff that was filed by Kansas City Power & Light Company (KCP&L) in support of a proposal to sell generation at market-based rates.[74] The Commission explained that, in light of AEP, the utility's proposed open access transmission tariff (which provided only for point-to-point service) did not adequately mitigate its transmission market power so as to justify allowing the requested market-based rates. KCP&L could charge market-based rates for sales only if it modified its proposed transmission tariff to reflect the AEP comparability standard.

Since then, the Commission has required comparable service in a variety of contexts, and has set for hearing the factual issues associated with comparable service. For example, the Commission found that market power can be adequately

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[72] *Id.* at p. 61,490.

[73] *Id.* at pp. 61,490-91.

[74] *See Kansas City Power & Light Company,* 67 FERC ¶ 61,183 (1994), *reh'g pending.*

mitigated only if a merged company offers transmission services in accordance with the AEP comparability standard.[75] The Commission further held that, even if a merger does not result in an increase in market power, the merger would not be consistent with the public interest under section 203 of the FPA unless the merged company offers comparable transmission services, as defined in AEP.[76] The Commission therefore announced a transmission comparability requirement for all new mergers:

Given the transition of the electric utility industry as a whole, we conclude that, absent other compelling public interest considerations, coordination in the public interest can best be secured only if merging utilities offer comparable transmission services.[77]

In Heartland Energy Services, Inc.,[78] the Commission applied its comparability standard to an affiliated electric power marketer seeking blanket authorization to sell electricity at market-based rates. The Commission explained that

For all future cases involving blanket approval of market-based rates an offer of comparable transmission services will be required before the Commission will be able to find that transmission market power has been adequately mitigated. In the context of an affiliated power marketer, this means that all of its affiliated utilities must have a comparable transmission tariff on file.[79]

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[75] *E.g., CSW, supra*, 68 FERC at p. 61,914.

[76] *Id.*

[77] *Id.* at p. 61,915 (footnote omitted).

[78] 68 FERC ¶ 61,223 (1994).

[79] *Id.* at p. 62,060. *In InterCoast Power Marketing Company*, 68 FERC ¶ 61,248, *clarified*, 68 FERC ¶ 61,324 (1994), the Commission rejected an affiliated marketer's proposal to sell at market rates without its

The Commission also denied a request by a company affiliated with a transmission-owning utility seeking permission to sell power at market-based rates to a particular customer. The denial was without prejudice to refiling such a request in a new section 205 proceeding, but only after the affiliated transmission-owning utility filed a comparable transmission service tariff.[80] The Commission added that it

> Will require comparability in any situation in which a seller seeking market-based rates is affiliated with an owner or controller of transmission facilities.[81]

The Commission has also stated that "it will henceforth apply the transmission comparability standard announced in the AEP case to all transmitting utility members of an RTG."[82]

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affiliate utility offering comparable transmission services. The Commission stated that the only way to ensure that InterCoast does not have transmission market power is to require its affiliated public utility to offer comparable transmission services. *See also LG&E Power Marketing Inc.*, 68 FERC ¶ 61,247 at pp. 62,120-21 (1994). The Commission added that this is consistent with encouraging competitive bulk power markets as envisioned by the Energy Policy Act of 1992. *Id.* at p. 62,132.

[80] *See Hermiston Generating Company*, 69 FERC ¶ 61,035 at p. 61,164 (1994), *reh'g pending*. The Commission subsequently accepted the rates on a cost basis. See Letter Order dated November 10, 1994.

[81] *Id.* at p. 61,165.

[82] *See SWRTA*, 69 FERC at p. 61,397; *see also PacifiCorp, the California Municipal Utilities Association, and the Independent Energy Producers (on behalf of Western Regional Transmission Association)*, 69 FERC ¶ 61,099, *order on reh'g*, 69 FERC ¶ 61,352 (1994), *order on compliance filing*, 71 FERC ¶ 61,158 (1995) *(WRTA)*. An RTG is a regional transmission group. It is defined as "a voluntary organization of transmission owners, transmission users, and other entities interested in coordinating transmission planning (and expansion), operation and use on a regional (and inter-regional." Policy Statement Regarding Regional Transmission Groups, 58 FR 41626 (August 5, 1993), *FERC Statutes and Regulations* ¶ 30,976 at p. 30,870 n.4 (RTG Policy Statement).

The Commission further declared that comparable services must be provided through "open access" tariffs rather than only on a contract-by-contract basis:

(T)ariffs are essential to the provision of comparable services. Tariffs set out the services that are available and the terms and conditions under which those services will be made available * * *. (In contrast), a negotiation process creates uncertainty and imposes on customers delay and other transaction costs that the transmitting utility members of an RTG do not incur when using the transmission for their own benefit. Moreover, the ability to execute separate transmission agreements with different but similarly situated customers is the ability to unduly discriminate among them. A tariff ensures against such discrimination in the RTG.[83]

Thus, the Commission required the RTGs to amend their bylaws to commit all transmitting utility members to offer comparable transmission services to other RTG members pursuant to a transmission tariff or tariffs.

As discussed below, since the AEP comparability standard was announced, the Commission has set for hearing 44 open access tariffs to determine what constitutes comparable service. This number includes tariffs filed subsequent to the Open Access NOPR. All tariffs have now been made subject to the outcome of the Final Rule.

3. Lack of Market Power in New Generation

In 1994 in the KCP&L case, discussed in the prior section, the Commission continued to recognize that transmission remains a natural monopoly. However, it found that, in light of the industry and statutory changes that now allow ease of market entry, no wholesale seller of generation has market

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[83] *SWRTA*, 69 FERC at p. 61,398.

power in generation from new facilities.[84] In particular, the Commission explained that it had previously noted in Entergy Services, Inc. that

> There was significant evidence that non-traditional power project developers, including qualifying facilities and independent power projects, are becoming viable competitors in long-run markets.[85]

The Commission further explained that since Entergy, Congress had enacted the Energy Policy Act, which had lowered barriers to the entry of new suppliers by creating a new class of power suppliers—EWGs—that are exempt from the provisions of PUHCA.[86] The Commission concluded that, in considering market-based rate proposals for generation sales, it need only focus on market power in transmission, generation market power in short-run markets, and other barriers to entry.[87]

4. Further Commission Action Addressing a More Competitive Electric Industry

To address the fact that the electric industry is becoming more competitive, and to remove barriers that might inhibit a more competitive industry, the Commission has initiated a number of proceedings: (1) Stranded Cost NOPR,[88] (2)

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[84] *KCP&L*, 67 FERC ¶ 61,183 (1994).

[85] *Id.* at p. 61,557 (*citing Entergy Services, Inc.*, 58 FERC ¶ 61,234 at p. 61,756 and nn.63 and 65 (*Entergy*)).

[86] *Id.* The Commission added that "after examining generation dominance in many different cases over the years, we have yet to find an instance of generation dominance in long-run bulk power markets." *Id.*

[87] *Id.*

[88] *FERC Statutes and Regulations.* ¶ *32,507* (1994).

Transmission Pricing Policy Statement,[89] (3) Pooling Notice of Inquiry,[90] (4) Regional Transmission Group (RTG) Policy Statement,[91] and (5) Notice of Inquiry on Merger Policy.[92]

In the Stranded Cost NOPR the Commission recognized that the trend toward greater transmission access and the transition to a fully competitive bulk power market could cause some utilities to incur stranded costs as wholesale requirements customers (or retail customers) use their supplier's transmission to purchase power elsewhere. As the Commission noted, a utility may have built facilities or entered into long-term fuel or purchased power supply contracts with the reasonable expectation that its customers would renew their contracts and would pay their share of long-term investments and other incurred costs. If the customer obtains another power supplier, the utility may have stranded costs. If the utility cannot locate an alternative buyer or somehow mitigate the stranded costs, the Commission explained that "the costs must be recovered from either the departing customer or the remaining customers or borne by the utility's shareholders."[93] Accordingly, the Commission proposed to establish provisions concerning the recovery of wholesale and retail stranded costs by public utilities and transmitting utilities.

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[89] Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act, 59 FR 55031 (November 3, 1994), *FERC Statutes and Regulations* ¶ 31,005 (Transmission Pricing Policy Statement).

[90] Inquiry Concerning Alternative Power Pooling Institutions Under the Federal Power Act, 59 FR 54851 (October 26, 1994), *FERC Statutes and Regulations* ¶ 35,529 (1995) (Pooling Notice of Inquiry).

[91] *FERC Statutes and Regulations* ¶ 30,976 (RTG Policy Statement).

[92] *FERC Statutes and Regulations* ¶ 35,531 (1996).

[93] *FERC Statutes and Regulations* ¶ 32,507 at p. 32,864.

In the Transmission Pricing Policy Statement, the Commission announced a new policy providing greater flexibility in the pricing of transmission services provided by public utilities and transmitting utilities. The Commission traditionally had allowed only postage-stamp, contract-path pricing.[94] Under the new policy, we will permit a variety of proposals, including distance sensitive and flow-based pricing, which may be more suitable for competitive wholesale power markets.[95] The Commission explained that this "(g)reater pricing flexibility is appropriate in light of the significant competitive changes occurring in wholesale generation markets, and in light of our expanded wheeling authority under the Energy Policy Act of 1992."[96] However, the Commission explained that any new transmission pricing proposal must meet the Commission's AEP comparability standard. The Commission further explained that comparability of service applies to price as well as to terms and conditions.[97]

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[94] Most transmission contracts set a single price for energy flow over a utility's transmission system. This single-price policy is called "postage stamp" pricing because the rate does not depend on how far the power moves within a company's transmission system. If power flows through several companies, traditional industry practice is to specify that power flows along a "contract path" consisting of the transmission-owning utilities between the ultimate receipt and delivery points. *See Indiana Michigan Power Company*, 64 FERC ¶ 61,184 at p. 62,545 (1993).

[95] Unlike with postage stamp pricing, with distance-sensitive pricing the cost of moving power through a company depends on how far the power moves within the company. In contrast to contract path pricing, flow-based pricing establishes a price based on the costs of the various parallel paths actually used when the power flows. Because flow-based pricing can account for all parallel paths used by the transaction, all transmission owners with facilities on any of the parallel paths could be compensated for the transaction.

[96] *FERC Statutes and Regulations* ¶ 31,005, at p. 31,136.

[97] *Id.* at p. 31,142.

The Commission issued the Pooling Notice of Inquiry to receive comments on traditional power pools and on alternative power pooling institutions that are being explored in today's more competitive environment. The Commission expressed concern that

(G)iven the ongoing changes in the competitive environment of the electric utility industry—in particular, the potential for substantially increased access to transmission—we must consider whether we are appropriately balancing our dual objectives of promoting coordination and competition.[98]

Accordingly, the Commission explained that it wished to look at alternative power pooling institutions and to re-examine the role of more traditional power pools in today's environment of increased competition. In particular the Commission expressed its intent to ensure that its policies "are consistent with the development of a competitive bulk power market."[99]

In the RTG Policy Statement, the Commission announced a policy encouraging the development of RTGs. The Commission explained that a primary purpose of RTGs is to facilitate transmission access for potential users and voluntarily resolve disputes over such service. The Commission has approved the formation of three RTGs.[100] One of the conditions is that each RTG member must offer comparable transmission services by tariff to other RTG members.

In the merger NOI, the Commission indicated that it will review whether its criteria and policy for evaluating mergers

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[98] *FERC Statutes and Regulations* ¶ 35,529, at p. 35,715.

[99] *Id.* at p. 35,714. As explained below, the Commission held technical conferences on issues surrounding power pools and competition.

[100] *See WRTA and SWRTA, supra,* and *Northwest Regional Transmission Association,* 71 FERC ¶ 61,397 (1995).

need to be modified in light of the changing circumstances occurring in the electric industry.

In addition to the Commission's actions, a number of states have initiated proceedings concerning retail wheeling or proposed legislation for retail wheeling, that is, for ultimate consumers to choose their supplier of power, or other restructuring proposals.[101]

5. Events Since Issuance of Open Access NOPR

Since issuance of the Open Access NOPR, public utilities have filed, in some form or another, 47 open access tariffs. In acting on those filings, the Commission has made all of the non-rate terms and conditions of those proposed tariffs subject to the outcome of this Final Rule.[102]

Over the last year, the Commission also has received and analyzed more than 20,000 pages of comments that were received from over 400 commenters, as well as additional information provided by industry participants at a number of

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[101] At least 12 states have retail wheeling proposals, legislation, or pilot programs underway—Alabama, California, Connecticut, Illinois, Massachusetts, Michigan, New Hampshire, New York, Ohio, Rhode Island, Vermont, and Wisconsin. At least 14 other states are investigating retail wheeling. Currently, according to a report of the NARUC-affiliated National Council on competition and the Electric Industry, 41 States are actively involved in investigating whether and how to restructure their respective electric power markets. Of this total, 29 State regulatory authorities * * * have initiated investigations. In addition, five State legislatures are involved in similar investigations, while seven other States have joint regulatory/legislative proceedings underway.

Testimony of the Honorable Cheryl L. Parrino, Chair of the Wisconsin Public Service Commission, on behalf of the National Association of Regulatory Utility Commissioners, before the United States Senate Committee on Energy and Natural Resources (March 6, 1996).

[102] *See American Electric Power Service Corporation,* et al., 72 FERC ¶ 61,287 at p. 61,238 (1995).

Commission-initiated technical conferences.[103] Those technical conferences addressed several issues—ancillary services, pro forma tariffs, power pools, and ISOs—and provided significant input to the Commission's formulation of this Final Rule.

F. *Need for Reform*

The many changes discussed above have converged to create a situation in which new generating capacity can be built and operated at prices substantially lower than many utilities' embedded costs of generation. As discussed above, new generation facilities can produce power on the grid at a cost of less than 3 cents per kWh to 5 cents per kWh, yet the costs for large plants constructed and installed over the last decade were typically in the range of 4 to 7 cents per kWh for coal plants and 9 to 15 cents for nuclear plants.

Non-traditional generators are taking advantage of this opportunity to compete. Indeed, the non-traditional generators' share of total U.S. electricity generation increased from 4 percent in 1985 to 10 percent in 1993.[104] Much of this increased share of generation is the result of competitive bidding for new generation resources that has occurred in 37 states. Since 1984, almost 4,000 projects, representing over 400,000 MW, have been offered in response to requests. Over 350 projects have been selected to supply 20,000 MW, and, of these, 126 are now online producing almost 7,800 MW of power.[105]

In addition, the cost of utility-generated electricity differs widely across the major regions of the United States. Average

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[103] Attached to this Final Rule as Appendix B is a list of commenters and the abbreviations used to designate them, including those commenters that filed late.

[104] Energy Information Administration, *Performance Issues for a Changing Electric Power Industry* (January 1995) 10 and (Figure 5).

[105] Current Competition, November 1994, Vol. 5, No. 8, at p. 8.

utility rates range from 3 to 5 cents in the Northwest to 9 to 11 cents in California. Electricity consumers are demanding access to lower cost supplies available in other regions of the United States, and access to the newer, lower cost generation resources. Therefore, it is important that the non-traditional generators of cheaper power be able to gain access to the transmission grid on a non-discriminatory open access basis.

The Commission's goal is to ensure that customers have the benefits of competitively priced generation. However, we must do so without abandoning our traditional obligation to ensure that utilities have a fair opportunity to recover prudently incurred costs and that they maintain power supply reliability. As well, the benefits of competition should not come at the expense of other customers. The Commission believes that requiring utilities to provide non-discriminatory open access transmission tariffs, while simultaneously resolving the extremely difficult issue of recovery of transition costs (discussed infra), is the key to reconciling these competing demands.

Non-discriminatory open access to transmission services is critical to the full development of competitive wholesale generation markets and the lower consumer prices achievable through such competition.[106] Transmitting utilities own the transportation system over which bulk power competition occurs and transmission service continues to be a natural monopoly. Denials of access (whether they are blatant or subtle), and the potential for future denials of access, require the Commission to revisit and reform its regulation of transmission in interstate commerce. As discussed in detail in

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[106] As discussed above, a significant number of public utilities still do not have any form of an "open access" tariff on file with the Commission and no public utility has on file a non-discriminatory open-access tariff as defined by this Rule.

Section IV.B., such action is required by the FPA's mandate that the Commission remedy undue discrimination.

Since the time the NOPR issued, the Commission staff has completed an FEIS that provides a quantitative estimate of some of the cost savings expected from this Rule: approximately $3.8 to $5.4 billion per year. Other non-quantifiable benefits are also expected from this Rule and include: (1) Better use of existing assets and institutions; (2) new market mechanisms; (3) technical innovation; and (4) less rate distortion. These potential benefits to the Nation's electricity consumers and the economy as a whole confirm the need to take generic action to remove barriers to competition. In what follows, we set out the changes necessary to remedy undue discrimination and to ensure a fair transition to a more competitive regulatory regime.

* * *

Commission Conclusion

Requirements and Transmission Contracts

We do not believe it is appropriate to order generic abrogation of existing requirements and transmission contracts. While the Commission did generically find it appropriate to modify natural gas contracts to complete the move to a competitive commodity market in natural gas, we face a different situation here. At the time the Commission addressed this situation in the natural gas industry, it was faced with shrinking natural gas markets, statutory escalations in natural gas ceiling prices under the Natural Gas Policy Act, and increased production of gas.[172] In other words, there was a market failure in the industry that required the extraordinary

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[172] *See* Pierce, Richard J., *Reconstituting the Natural Gas Industry from Wellhead to Burnertip*, 9 Energy L.J. 1 (1988).

measure of generically allowing all customers to break their contracts with pipelines.

In contrast, there is no such market failure in the electric industry. Although changes in the industry have been and continue to be dramatic, we do not believe they compel generic abrogation of requirements and transmission contracts.[173]

While we have concluded that current conditions in the wholesale power market do not warrant the generic modification of requirements contracts, we conclude nonetheless that the modification of certain requirements contracts on a case-by-case basis may be appropriate. We conclude further that, even if customers under such contracts are bound by so-called Mobile-Sierra clauses, they nonetheless ought to have the opportunity to demonstrate that their contracts no longer are just and reasonable.

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B. *Legal Authority*

The Commission reaffirms its conclusion in the NOPR that we have the authority under the FPA to order wholesale transmission services in interstate commerce to remedy undue discrimination by public utilities. We analyze below the relevant cases examining our wheeling authority, then discuss and respond to the legal arguments raised by the commenters.

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[173] In addition, we do not believe that unfavorable requirements contracts will derail the attainment of competitive wholesale power markets. Indeed, many of the commenters support this position and *seek* to retain their existing requirements contracts.

1. Bases for Legal Authority

a. Undue Discrimination/Anticompetitive Effects

In upholding the Commission's order requiring non-discriminatory open access in the natural gas industry, the court in Associated Gas Distributors v. FERC stated that the Natural Gas Act "fairly bristles" with concern for undue discrimination.[193] The same is true of the FPA. The Commission has a mandate under sections 205 and 206 of the FPA to ensure that, with respect to any transmission in interstate commerce or any sale of electric energy for resale in interstate commerce by a public utility, no person is subject to any undue prejudice or disadvantage. We must determine whether any rule, regulation, practice or contract affecting rates for such transmission or sale for resale is unduly discriminatory or preferential, and must prevent those contracts and practices that do not meet this standard. As discussed below, AGD demonstrates that our remedial power is very broad and includes the ability to order industry-wide non-discriminatory open access[194] as a remedy for undue discrimination. The AGD court reached this decision even in the face of prior cases that acknowledged that Congress did not mandate common carriage or explicitly empower the Commission to order direct access for either gas transporters or electric utilities. Moreover, the Commission's power under the FPA "clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility

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[193] *Associated Gas Distributors v. FERC*, 824 F.2d 981, 998 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) (AGD).

[194] We use the term "open access" to refer to a public utility's obligation to put a tariff on file offering service to eligible customers. Access is not open to all. Specifically, the tariff is not an offer to serve retail customers if state law does not permit retail wheeling.

operations pursuant to (FPA) sections 202 and 203, and under like directives contained in sections 205, 206, and 207."[195]

Therefore, based on the mandates of sections 205 and 206 of the FPA and the case law interpreting the Commission's authority over transmission in interstate commerce, we conclude that we have ample legal authority—indeed, a responsibility—under section 206 of the FPA to order the filing of non-discriminatory open access transmission tariffs if we find such order necessary as a remedy for undue discrimination or anticompetitive effects.[196] We discuss below the primary court decisions that touch on our wheeling authority under sections 205 and 206.

The Commission's authority to order access as a remedy for undue discrimination under the Natural Gas Act (NGA) was upheld and discussed in detail in AGD. In AGD, the court upheld in relevant part the Commission's Order No. 436.[197] That order found the prevailing natural gas company practices to be "unduly discriminatory" within the meaning of section 5 of the NGA (the parallel to section 206 of the FPA) and held that if pipelines wanted blanket certification for their transportation services, they must commit to transport gas for

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[195] *Gulf States Utilities Company v. FPC*, 411 U.S. 747, 758-59 (1973).

[196] In most situations, discrimination that precludes transmission access or gives inferior access will have at least potential anticompetitive effects because it limits access to generation markets and thereby limits competition in generation. Similarly, it is probable that any transmission provision that has anticompetitive effects would also be found to be unduly discriminatory or preferential because the anticompetitive provision would most likely favor the transmission owner *vis-a-vis* others.

[197] Order No. 436, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, *FERC Statutes and Regulations* ¶ 30,665 (1985).

others on a non-discriminatory basis; in other words, they must provide non- discriminatory open access.

In upholding the Commission's authority to require open access, the court first noted that the opponents' arguments against such authority must proceed "uphill." The statute contains no language forbidding the Commission to impose common carrier status on pipelines, let alone forbidding the Commission to impose "a specific duty that happens to be a typical or even core component of such status." The court found that the legislative history cited by the opponents came nowhere near overcoming this statutory silence. Rather, the legislative history supported only the proposition that Congress itself declined to impose common carrier status.[198] Emphasizing Congress' deep concern with undue discrimination, the court found that the Commission had ample authority to "stamp out" such discrimination:

The issue seems to come down to this: Although Congress explicitly gave the Commission the power and the duty to achieve one of the prime goals of common carriage regulation (the eradication of undue discrimination), the Commission's attempted exercise of that power is invalid because Congress in 1906 and 1914 and 1935 and 1938 itself refrained from affixing common carrier status directly onto the pipelines and from authorizing the Commission to do so. And this proposition is said to control no matter how sound the Order may be as a response to the facts before the Commission. We think this turns statutory construction upside down, letting the failure to grant a general power prevail over the affirmative grant of a specific one.[199]

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[198] *AGD, supra*, 824 F.2d at p. 997.

[199] *Id.* at p. 998.

The AGD court found that court decisions under the FPA did not support the view that the Commission's authority to "stamp out" undue discrimination is hamstrung by an inability to require non-discriminatory open access as a remedy. These decisions are discussed below.

One of the earliest cases on wheeling is Otter Tail Power Company v. United States (Otter Tail).[200] In that case, the Supreme Court rejected the argument that the District Court, in a civil antitrust suit, could not order wheeling because to do so would conflict with the FPC's purported wheeling authority.[201] The Court explained that Congress had decided not to impose a common carrier obligation on the electric power industry and noted that the Commission was not at that time expressly granted power to order wheeling.[202] In effect, it concluded that because Congress did not include common carrier provisions in the FPA, the Commission must not have any express authority to order wheeling that would preclude the District Court from imposing a wheeling remedy. Nowhere, however, did the Court say that the Commission lacked authority under section 206 to remedy undue discrimination. Indeed, that was simply not a matter before the Court or of any consequence to its decision.

In the FPA, while Congress elected not to impose common carrier status on the electric power industry, it tempered that determination by explicitly providing the Commission with the authority to eradicate undue discrimination—one of the goals of common carriage regulation.[203] By providing this broad authority to the Commission, it assured itself that in preserving

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200 410 U.S. 366 (1974).

201 410 U.S. at pp. 375-76.

202 *Id.* at pp. 374-76.

203 *See AGD*, 824 F.2d at p. 998.

"the voluntary action of the utilities" it was not allowing this voluntary action to be unfettered. It would be far-reaching indeed to conclude that Otter Tail, which was a civil antitrust suit that raised issues entirely unrelated to our authority under section 206, is an impediment to our achieving one of the primary goals of the FPA—eradicating undue discrimination in transmission in interstate commerce in the electric power industry.

In Richmond Power & Light Company v. FERC (Richmond),[204] the FPC, in reaction to the 1973 oil embargo, was attempting to reduce dependence on oil. The FPC requested that utilities with excess capacity wheel power to the New England Power Pool (NEPOOL). In response, several suppliers and transmission owners filed rate schedules with the FPC that provided for voluntary wheeling. Richmond Power & Light Company (Richmond) objected to these filings, claiming that they were unreasonable because they did not guarantee transmission access. The FPC refused to compel the utilities to wheel Richmond's power, stating that it did not have the authority to order a public utility to act as a common carrier.

The D.C. Circuit upheld the Commission. It acknowledged that Richmond's argument was persuasive in some respects, but stated that any conditions the Commission might impose could not contravene the FPA. The court examined the legislative history of the FPA and stated that "[i]f Congress had intended that utilities could inadvertently bootstrap themselves into common-carrier status by filing rates for voluntary service, it would not have bothered to reject mandatory wheeling * * *."[205]

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[204] 574 F.2d 610 (D.C. Cir. 1978).

[205] *Id.* at p. 620.

However, the D.C. Circuit in no way indicated that the Commission was foreclosed from ordering transmission as a remedy for undue discrimination. Richmond also had argued that the alleged refusal of the American Electric Power Company (AEP) and its affiliate, Indiana & Michigan Electric Company (Indiana), to wheel Richmond's excess energy was unlawful discrimination because AEP and Indiana wheeled higher-priced electricity from other AEP affiliates. The court acknowledged that Richmond's claim of unlawful discrimination was theoretically valid, but found that Richmond had failed to prove its case. It noted that if Richmond had argued that the rates were unjustifiably discriminatory, or that Indiana's failure to use its transmission capability fully or to purchase less expensive electricity for wheeling resulted in unnecessarily high rates, a different case would be before the court.[206] The case thus does not in any way limit the Commission's authority to remedy undue discrimination.

In Central Iowa Power Cooperative v. FERC,[207] the FPC[208] reviewed the terms of the Mid-Continent Area Power Pool (MAPP) Agreement under its section 205 and 206 authority. The agreement contained two membership limitations. First, the agreement established two classes of membership, with one class being entitled to more privileges than the other. Second, the agreement excluded non-generating distribution systems from pool services. The FPC found the first limitation on membership—the two-class system—to be unduly

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[206] *Id.* p. 623, nn.53 and 57.

[207] 606 F.2d 1156 (D.C. Cir. 1979).

[208] While *Central Iowa* was pending, certain of the functions of the FPC were transferred to the FERC under the DOE Organization Act. Accordingly, the FERC was substituted for the FPC as the respondent in the case.

discriminatory and not reasonably related to MAPP's objectives. The FPC conditioned approval of the agreement under section 206 on the removal of the unduly discriminatory provision. The FPC found that the second limitation, the exclusion of non-generating distribution systems, was not anticompetitive and did not render the agreement inconsistent with the public interest.

On appeal, the D.C. Circuit affirmed the FPC's decision. The court found that the FPC did have authority to order changes in the scope of the MAPP agreement, if the agreement was unjust, unreasonable, unduly discriminatory or preferential under section 206 of the FPA. The court stated:

The Commission had authority, * * * under section 206 of the Act, * * * to order changes in the limited scope of the Agreement, including the addition of pool services, if, in the absence of such modifications, the Agreement presented "any rule, regulation, practice or contract (that was) unjust, unreasonable, unduly discriminatory or preferential."[209] However, the court agreed with the FPC's conclusion that the limited scope of MAPP was not unjust, unreasonable, or unduly discriminatory. The court recognized that a pool was not invalid under section 206 merely because a more comprehensive arrangement was possible.

The D.C. Circuit upheld the Commission's refusal to eliminate the second limitation on membership by ordering MAPP participants to wheel to non-generating electric systems.[210] However, neither the Commission nor the court was presented with the argument that wheeling was necessary as a remedy for undue discrimination.

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[209] 606 F.2d at p. 1168.

[210] *Id.* at p. 1169; *see also Municipalities of Groton v. FERC*, 587 F.2d 1296 (D.C. Cir. 1978).

In Florida Power & Light Company v. FERC (Florida),[211] the Commission ordered Florida Power & Light Company (FP&L) to file a tariff setting forth FP&L's policy relating to the availability of transmission service.[212] FP&L objected to including such a policy statement in its tariff and argued that the filing of such a policy would convert FP&L into a common carrier by obligating it to offer service to all customers.[213] There was no finding that the action ordered was necessary to remedy undue discrimination.

The Fifth Circuit Court of Appeals agreed with FP&L that the mandatory filing of the policy statement would require FP&L to provide transmission service beyond its voluntary commitment because such a requirement would change its duties and liabilities.[214] The Commission order would impose

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[211] 660 F.2d 668 (5th Cir. 1981), *cert. denied sub nom. Fort Pierce Utilities Authority v. FERC*, 459 U.S. 1156 (1983).

[212] FP&L provided transmission service when four conditions were met: (1) The specific potential seller and buyer were contractually identified; (2) the magnitude, time and duration of the transaction were specified prior to the commencement of the transmission; (3) it could be determined that the transmission capacity would be available for the term of the contract; and (4) the rate was sufficient to cover FP&L's costs.

[213] All utilities requesting wheeling services, subject to availability, would be entitled to receive transmission service under the filed terms. Any changes to a filed rate must be filed with the Commission. This is the so-called "filed rate doctrine." *See Northwestern Public Service Company v. Montana-Dakota Utilities Company,* 181 F.2d 19, 22 (8th Cir. 1980), aff'd, 341 U.S. 246 (1951).

[214] Under the filed rate doctrine, a refusal to wheel would be unduly discriminatory under section 206 of the FPA. As the court acknowledged, a customer refused service could petition the Commission to find that FP&L's policy of availability was unduly discriminatory under section 206(a) of the FPA. The court said that in the absence of a tariff on file, a utility refused wheeling services would be unable to claim discrimination under section 206(a) of the FPA. 660 F.2d at p. 675 (expressing "serious doubts that such a petition would be successful in the absence of a tariff").

common carrier status on FP&L, the court found.[215] The court noted that the Commission did not rely on a finding of anticompetitive behavior and therefore the court did not address the Commission's power to remedy antitrust violations.[216]

The AGD court explicitly rejected the claim that the above line of cases establishes that the Commission lacks authority to require non-discriminatory open access.[217] Opponents of the Commission's order argued in AGD that Richmond and Florida, supra, stand for the proposition that the Commission cannot indirectly do what it allegedly cannot do directly, that is, impose common carriage. The AGD court rejected these arguments, stating that the petitioners read the electric cases far too broadly:

(n)either Richmond nor Florida comes anywhere near stating that the Commission is barred from imposing an open-access condition in all circumstances.[218]

The court noted that the Florida case had expressly left open the question of whether the Commission would be entitled to use an open access condition as a remedy for anticompetitive conduct, and that in Richmond the D.C. Circuit had said little more than that unwillingness to transmit for all could not be automatically deemed undue discrimination. The court also noted the Central Iowa case, supra, in which it had upheld a Commission order that found a power pooling agreement

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[215] *Id.* at p. 676.

[216] *Id.* at p. 678.

[217] The AGD court did not address *New York State Electric & Gas Corporation v. FERC*, 638 F.2d 388 (2d Cir. 1980), cert. denied, 454 U.S. 821 (1981) (NYSEG), presumably because that case did not concern whether the Commission could order wheeling as a remedy for undue discrimination.

[218] 824 F.2d at p. 999.

discriminatory on its face because the agreement gave one class of membership privileged status over another. The court stated that the Central Iowa case "upholds the power of the Commission to subject approval of a set of voluntary transactions to a condition that providers open up the class of permissible users."[219] The court added that it refused to "turn statutory construction upside down" by letting Congress' failure to grant a general power of common carriage prevail over the affirmative grant of the specific power to eradicate undue discrimination.[220]

We conclude that AGD's analysis of undue discrimination under sections 4 and 5 of the Natural Gas Act is equally applicable to an undue discrimination analysis under sections 205 and 206 of the FPA. The Commission and courts have long recognized that the NGA was patterned after the FPA and that the two statutes should be interpreted in the same manner.[221] Thus, we conclude that we have the authority to remedy undue discrimination and anticompetitive effects by requiring all public utilities that own, control or operate transmission facilities to file non-discriminatory open access transmission tariffs.

b. Section 211 of the Federal Power Act

In concluding that we must invoke our section 206 authority to remedy undue discrimination and anticompetitive effects in the electric industry, we have carefully considered the

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[219] *Id.* at p. 999.

[220] *Id.* at p. 1006.

[221] *See, e.g., FPC v. Sierra Pacific Power Company,* 350 U.S. 348, 353 (1956); *Arkansas Louisiana Gas Company v. Hall,* 453 U.S. 571, 577 n.7 (1981); and *Kentucky Utilities Company v. FERC,* 760 F.2d 1321, 1325 n.6 (D.C. Cir. 1985). Section 206 of the FPA was recently revised and now differs from section 5 of the NGA, but not in a manner significant to our discussion here. See 16 U.S.C. 824e (b) and (c).

goals of Title VII of the Energy Policy Act, and whether section 211 of the FPA, by itself, is sufficient to remedy undue discrimination in public utility transmission services. Title VII of the Energy Policy Act, which amended section 211 of the FPA to give the Commission broader authority to order wheeling in the public interest on a case-by-case basis, reflects the intent of Congress to encourage competitive wholesale electric markets. Section 211 provides a means for wholesale power sellers and buyers to obtain transmission services necessary to compete in, or to reach, competitive markets, and is a valuable tool to encourage competitive markets. However, in amending section 211, Congress left unaltered the authorities and obligations of the Commission under sections 205 and 206 (similar to our authorities and obligations under sections 4 and 5 of the NGA) to remedy undue discrimination. In addition, as discussed below, reliance on section 211 alone in some circumstances can result in the perpetuation of, rather than the elimination of, undue discrimination and anticompetitive effects.

First, there are inherent delays in the procedures for obtaining service under section 211. However, for competitive reasons, many transactions must be negotiated relatively quickly. Many competitive opportunities will be lost by the time the Commission can issue a final order under section 211. Case-by-case section 211 proceedings are not a substitute for tariffs of general applicability that permit timely, non-discriminatory access on request.

Second, discrimination is inherent in the current industry environment in which some customers and sellers are served by open access systems, and others have to rely on negotiated bilateral arrangements or the mandatory section 211 process. The end result is discrimination in the ability to obtain transmission services, as well as in the quality and prices of the services. This national patchwork of open and closed

transmission systems, with disparate terms and conditions of service, cannot be cured effectively through section 211.

The Commission believes that its actions under sections 205 and 206 will complement the section 211 procedures to achieve both the Energy Policy Act's goals of creating more competitive bulk power markets and lower rates for consumers and the Federal Power Act's explicit direction in section 205(b) that no public utility shall, with respect to any transmission in interstate commerce, grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage.

* * *

Commission Conclusion

There can be no question that the Commission has the authority to remedy undue discrimination. Sections 205 and 206 of the FPA mandate that we ensure that, with respect to any transmission in interstate commerce or any sale of electric energy for resale in interstate commerce by a public utility, no person is subject to any undue prejudice or disadvantage. Under these sections, we must determine whether any rule, regulation, practice, or contract affecting rates for such transmission or sale for resale is unduly discriminatory or preferential, and we must disapprove those contracts and practices that do not meet this standard. Our discretion is at its zenith in fashioning remedies for undue discrimination.[231]

Some commenters, however, challenge our authority to order industry-wide non-discriminatory open access as a remedy for the undue discrimination we have found in the industry. As summarized above, they essentially assert that we are prohibited by court precedent, the legislative history of the

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[231] *See, e.g., Niagara Mohawk Power Corporation v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967).

FPA, and sections 211 and 212 of the FPA from ordering wheeling as a remedy for undue discrimination. We disagree and conclude that we have the authority—indeed, a responsibility—to require non-discriminatory open access transmission as a remedy for undue discrimination.

AGD and Legislative History

The court decision in Associated Gas Distributors v. FERC provides powerful support for our ability to order industry-wide non-discriminatory open access transmission in the electric industry as a remedy for undue discrimination. As discussed in detail above, AGD, which is the only decision to have addressed the Commission's authority to remedy undue discrimination by requiring open access, upheld our authority under section 5 of the NGA (the parallel to section 206 of the FPA) to require open access in the natural gas industry. The rationale supplied by the AGD court applies equally to the FPA and our responsibility to eliminate undue discrimination in the electric industry.

Those who challenge the Commission's legal authority to remedy undue discrimination face the same difficulty that parties faced in seeking to overturn open access in the natural gas industry—they "can point to no language in the (FPA) barring the Commission from imposing common carrier status on (public utilities), and certainly none barring it from imposing upon the (public utilities) a specific duty that happens to be a typical or even core component of such status."[232] Instead, as was unsuccessfully attempted in the AGD proceeding, they seek to overcome the statutory silence primarily by means of legislative history. However, as the AGD court explained, legislative history is not even relevant, because courts have no authority to enforce principles gleaned solely

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[232] AGD, 824 F.2d at p. 997.

from legislative history that has no statutory reference point.[233] Here, as the court found with respect to the NGA, the legislative history of the FPA "provides strong support only for the point that Congress declined itself to impose common carrier status on (public utilities) * * * It affords weak—almost invisible—support for the idea that the Commission could under no circumstances whatsoever impose obligations encompassing the core of a common carriage duty."[234]

Commenters focus on the following statement in the AGD decision to support the argument that, because Congress did not expressly reject common carriage under the NGA, but did reject it under the FPA, a different outcome in this proceeding is required:

we note that the legislative history of the two acts is, on this point, materially different. In its deliberations on the bill that ultimately emerged as the Federal Power Act, Congress considered and rejected a provision that would have "empowered the Federal Power Commission to order wheeling if it found such action to be 'necessary or desirable in the public interest.'" (citing Otter Tail) (quoting S. 1725, 74th Cong., 1st Sess.). The evidence as to the NGA (surveyed above) is less direct: it consists exclusively of various occasions on which Congress did not adopt proposals actually making the natural gas pipelines into common carriers.[235]

The above statement, however, does not preclude the AGD court's decision on our broad authority to remedy undue discrimination in the gas industry from applying equally in the electric industry. Clearly, the court did not say that. As

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[233] *Id.* (quoting IBEW, Local No. 474 v. NLRB, 814 F.2d 697, 712 (D.C. Cir. 1987) (emphasis deleted by court from original)).

[234] *Id.* (emphasis added).

[235] *Id.* at p. 998-99.

discussed below, we believe the statement focuses on a distinction in the legislative histories that is not meaningful.

First, whether or not a material difference exists in the respective legislative histories of the NGA and FPA, the fact remains that the crucial findings of the AGD court were that: (1) "Congress declined itself to impose common carrier status" (emphasis added) and (2) there is no "support for the idea that the Commission could under no circumstances whatsoever impose obligations encompassing the core of a common carriage duty."[236] These findings apply equally to the FPA. Simply stated, statutory silence cannot be overcome by means of legislative history—even if the legislative history in fact indicated that Congress "rejected" legislative imposition of common carrier status under the FPA, but "did not adopt" it under the NGA. In either event, nothing in the statute or legislative history suggests that Congress concluded that the Commission could under no circumstances impose open access as a remedy to undue discrimination.

Moreover, the legislative history of the bills containing the FPA and the NGA, taken as a whole, suggests that the distinction drawn in AGD between the legislative histories of the NGA and the FPA is not meaningful. The legislation that was to become the FPA originally included provisions regulating both electric power and natural gas. As originally proposed, the legislation contained identical common carriage language for both public utilities and natural gas pipelines.

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[236] *Id.* at p. 997. We also note that the contract carriage obligation we are imposing is easily distinguished from the common carrier obligation Congress chose not to adopt. As discussed infra, the common carrier provisions rejected by Congress would have required transmission for "any person" upon reasonable request. This would have included retail purchasers.

With respect to the FPA, the Supreme Court explained in Otter Tail that (a)s originally conceived, Part II would have included a "common carrier" provision making it "the duty of every public utility to * * * transmit energy for any person upon reasonable request * * *." In addition, it would have empowered the Federal Power Commission to order wheeling if it found such action to be "necessary or desirable in the public interest." H.R. 5423, 74th Cong., 1st Sess.; S. 1725, 74th Cong. 1st Sess. These provisions were eliminated to preserve "the voluntary action of the utilities." S.Rep. No. 621, 74th Cong., 1st Sess., 19.[237] The language paraphrased by the Supreme Court was from Title II of the initial bill proposing the Public Utility Holding Company Act. The entire sections from which the paraphrased language came are as follows:

SEC. 202. (a) It shall be the duty of every public utility to furnish energy to, exchange energy with, and transmit energy for any person upon reasonable request therefor; and to furnish and maintain such services and facilities as shall promote the safety, comfort, and convenience of all its customers, employees, and the public, and shall be in all respects adequate, efficient, and reasonable.

* * *

SEC. 203. (b) Whenever the Commission after notice and opportunity for hearing finds such action necessary or desirable in the public interest, it may by order direct a public utility to make additions, extensions, repairs, or improvements to or changes in its facilities, to establish physical connection with the facilities of one or more other persons, to permit the use of its facilities by one or more other persons, or to utilize the facilities of, sell energy to, purchase energy from, transmit energy for, or exchange energy with, one or more other persons. Where any such order affects two or more persons, the

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[237] Otter Tail, 410 U.S. at p. 374.

Commission may prescribe the terms and conditions of the arrangement to be made between such persons, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.[238]

This initial bill proposing the Public Utility Holding Company Act also included a Title III that was intended to regulate the transmission and sale of natural gas. Sections 303(a) and 304 of Title III included the identical common carrier language paraphrased by the Supreme Court and included in sections 202(a) and 203(b) of Title II.[239] After further deliberations, Congress rejected the above-quoted language in Title II and eventually adopted a Title II that did not include any common carrier language. On the other hand, Title III (addressing regulation of natural gas) was not reported out of committee, but reemerged in the next year.[240] The bill that reemerged did not contain the common carrier language that was in the original Title III. However, as Congress had just debated the common carrier issue in enacting electric power regulation, it is not surprising that Congress did not engage in debating the very same issue in enacting natural gas regulation.

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[238] H.R. 5423, 74th Cong., 1st Sess., 32 (emphasis added).

[239] *Id.* at p. 44.

[240] In the debate on the subsequent bill to regulate natural gas, Congressman Cole explained:

> Mr. Chairman, the House should realize that the measure we are dealing with today is of extreme importance, more so than the attendance and the time taken in the discussion would seem to indicate. It is the culmination of one of the most far-reaching, intensive studies of the Federal Trade Commission I assume that that Commission ever conducted, and last year found a place in not identical language but very similar in the Rayburn bill, the famous holding-company bill, as part 3 thereof. Our committee eliminated part 3, as members will recall, and saved it for a separate measure reported out as it was last year, which was not considered by the House, but is here today in improved form.

81 Cong. Rec. H6724 (daily ed. July 1, 1937).

Because of the timing of the legislation involving the FPA and the NGA and the logical nexus between the two acts, we conclude that there is in fact no material difference as to this issue in the legislative histories of the two acts. Both initially included identical common carrier language, and the language was removed from both. As to both acts, Congress chose not to impose common carrier obligations on the electric or natural gas industries, but gave the Commission the authority and responsibility to eliminate undue discrimination in both industries. Consequently, as open access was found to be a proper remedy for undue discrimination in the natural gas industry, it is also a proper remedy for undue discrimination in the electric industry.

As the AGD court noted with respect to the Commission's powers and duties under the NGA, Congress explicitly gave the Commission the authority to eradicate undue discrimination under the FPA. That explicit power and duty provided by Congress cannot be invalidated solely on the ground that Congress chose not to impose statutory common carrier status on public utilities or did not explicitly authorize the Commission to do so.[241] As the AGD court explained, this would "turn [ ] statutory construction upside down, letting the failure to grant a general power prevail over the affirmative grant of a specific one.[242]

Other Case Law

A number of commenters argue that the Commission misinterpreted the other cases discussed in the NOPR with respect to our authority to order non-discriminatory open access transmission. We disagree. As demonstrated above, not one of the cases put forth by commenters holds that we cannot remedy

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[241] AGD, 824 F.2d at p. 998.

[242] *Id.*

undue discrimination by requiring public utilities to provide non-discriminatory open access transmission.[243]

AGD is the only case in which a court specifically addressed our authority to order open access transmission as a remedy for undue discrimination. Its favorable finding with respect to our action under section 5 of the NGA directly supports our ordering non-discriminatory open access transmission under section 206 of the FPA. Authority to Act by Rule

We disagree with those commenters that assert that we may find and remedy undue discrimination only through case-by-case adjudications and are prohibited from making a generic determination of undue discrimination through a rulemaking. First, there is no question that it is within our discretion whether we act through rule or through case-by-case adjudications.[244] The AGD court specifically rejected a similar argument that the Commission erred in requiring open access transportation tariffs without first finding that each individual pipeline's rates were unlawful. The AGD court held that "(t)he Commission is not required to make individual findings if it exercises its § 5 authority by means of a generic rule."[245]

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[243] *See FERC Statutes and Regulations* at p. 33,053-56. We further note that the AGD court did not discuss the NYSEG decision at all. Indeed, the NYSEG case did not involve any allegations of undue discrimination and any discussion of section 206 by the court was dictum.

[244] *See, e.g., NLRB v. Bell Aerospace Company*, 416 U.S. 267, 293 (1974) (*citing SEC v. Chenery Corporation*, 332 U.S. 194, 202-03 (1947). *See also Heckler v. Campbell*, 461 U.S. 458, 467 (1983) (even where enabling statute requires a hearing to be held, agency may rely on its rulemaking authority); *Panhandle Eastern Pipeline Company v. FERC*, 907 F.2d 185, 187-88 (D.C. Cir. 1990). Under section 403 of the DOE Act, 42 U.S.C. 7173, the Commission is authorized at its discretion to initiate rulemaking proceedings.

[245] AGD, 824 F.2d at p. 1008.

We have identified a fundamental generic problem in the electric industry: owners, controllers and operators of monopoly transmission facilities that also own power generation facilities have the incentive to engage, and have engaged, in unduly discriminatory practices in the provision of transmission services by denying to third parties transmission services that are comparable to the transmission services that they are providing, or are capable of providing, for their own power sales and purchases. These practices drive up the price of electricity and hurt consumers. Furthermore, the incentive to engage in such practices is increasing significantly as competitive pressures grow in the industry. It is within our discretion to conclude that a generic rulemaking, not case-by-case adjudications, is the most efficient approach to take to resolve the industry-wide problem facing us.

* * *

Commission Conclusion

We conclude that unduly discriminatory and anticompetitive practices exist today in the electric industry and, more importantly, that such practices will increase as competitive pressures continue to grow in the industry, unless the Commission acts now to prevent such practices.[257] It is in the economic self-interest of transmission monopolists, particularly those with high-cost generation assets, to deny transmission or to offer transmission on a basis that is inferior to that which they provide themselves. The inherent characteristics of monopolists make it inevitable that they will act in their own self-interest to the detriment of others by refusing transmission and/or providing inferior transmission to

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[257] While many public utilities have filed some form of open access tariff (often in response to our proposed rule), we believe that many of the remaining utilities will not voluntarily open their systems absent a final rule. See also note 266.

competitors in the bulk power markets to favor their own generation, and it is our duty to eradicate unduly discriminatory practices. As the AGD court stated: "Agencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall."[258]

We set forth examples in the NOPR of undue discrimination that we believe are occurring in the electric industry and invited commenters to identify any discrimination that they may have experienced. In response, commenters presented numerous additional examples of undue discrimination, which are summarized above, and we set forth below further examples of undue discrimination that have been raised in cases before the Commission.

Many of the examples of discriminatory behavior that have been brought to our attention do not name the specific utilities involved, and many are allegations that are not proven. However, we do not believe that this undermines our finding of unduly discriminatory practices by transmission owners and controllers. We believe that it is only natural that potential transmission customers with an interest in participating in electric markets will be reluctant to name names for fear of being shut out of those markets. CCEM, which identified a wide array of discriminatory behavior its members have experienced, explained that

(w)e do not identify the specific utilities in each example because it is the experience of CCEM members that nearly all transmission owners retaliate by cutting off all communications with anyone that challenges or complains about the rates, terms or conditions at which the owner offers access to its system. Inasmuch as most of the competitive commerce in electric power today is in short-term markets, it is typically not worth the effort of CCEM members or other transmission-dependent

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[258] AGD, 824 F.2d at p. 1008.

entities to file a complaint with the Commission's enforcement staff or in the courts in connection with a transmission owner's discriminatory practices. The deal is lost well before a complaint can be processed and ruled upon.[259]

Other examples of discriminatory behavior have also been raised in proceedings before the Commission. As we explained in detail in the NOPR, transmission-owning utilities have discriminated against others seeking transmission access in a variety of ways, most often subtly and indirectly.[260] For example, delaying tactics have been used to frustrate access. The history of Pacific Gas and Electric Company's (PG&E) attempt to avoid its commitments made to the California owners of the California-Oregon Transmission Project (COTP) is a prime example. The owners had originally planned the COTP to have its southern terminus at the Midway station with Southern California Edison. PG&E convinced them to terminate the project instead at PG&E's Tesla station and indicated that PG&E would provide transmission service the rest of the way south to Midway. PG&E promised this service in 1989 (in Principles). PG&E spent the next four years filing substitute provisions for what it had promised in the Principles.[261] Additional allegations of discriminatory behavior are set forth in Appendix C, which includes allegations made under oath in proceedings at the Commission and allegations made in pleadings and other documents before the Commission.

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[259] CCEM Initial Comments at p. 18-19. See also NIEP Reply Comments at p. 13 n.31.

[260] *FERC Statutes and Regulations* at p. 33,072.

[261] *See Pacific Gas and Electric Company*, 65 FERC ¶ 61,312 at p. 62,428-30 and n.22, remanded on other grounds, *Pacific Gas & Electric Company v. FERC*, No. 94-70037 (9th Cir. June 23, 1994) (unpublished opinion), order on remand, 69 FERC 61,006 (1994).

In addition, to date, the Commission has received 28 section 211 transmission requests.[262] Applicants submit section 211 transmission requests when the transmission provider refuses to provide the requested transmission service. For example, American Municipal Power-Ohio, Inc. (AMP-Ohio) requested Ohio Edison Company (Ohio Edison) to establish additional delivery points to certain of AMP-Ohio's members and to permit the addition of delivery points in the future upon AMP-Ohio's request. Ohio Edison refused AMP-Ohio's request, claiming that it was not a proper request under section 211 because it already provided wholesale transmission to the municipal utilities at issue. In a proposed order, the Commission disagreed with Ohio Edison and ordered Ohio Edison to provide the requested additional delivery points and to entertain future requests by AMP-Ohio for specific delivery points.[263]

Many of the examples of discriminatory actions we are seeing in the electric industry are similar to those we saw in the gas industry. Given our experience, we find that these examples of discriminatory actions are credible and well-founded. Thus, we conclude that there is more than sufficient reason to believe that transmission monopolists currently engage in unduly discriminatory practices, and that they will continue to engage in unduly discriminatory practices, unless we fashion a remedy to eliminate their ability and incentive to do so. In light of the competitive changes occurring in today's electric industry, we believe that the only effective remedy is non-discriminatory open access transmission, including functional unbundling and OASIS requirements, and that it is within our statutory authority to order that remedy.

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[262] A list of section 211 applications and the status of each is attached as Appendix A.

[263] *American Municipal Power-Ohio, Inc. v. Ohio Edison Company*, 74 FERC ¶ 61,086 (1996).

Further, we disagree with the argument that we are limited to applying a traditional antitrust analysis in determining whether market power exists in the transmission system. While we must take antitrust concerns into consideration in exercising our responsibilities under the FPA, we are not an antitrust court, and our responsibilities are not those of the Department of Justice.[264] We have analyzed the incentives and practices of monopoly transmission owners and controllers in light of the statutory standards and directives of the FPA and, based on our findings, have properly concluded that there is a generic problem that must be remedied.

The Commission also recognizes, as some commenters suggest, that we have, in the past, permitted utilities to file tariffs containing restrictions on transmission service that we are now finding to be unduly discriminatory in this rule and that we found unduly discriminatory in cases since our decision in AEP. However, it is entirely appropriate, and indeed necessary, that our application of the FPA's undue discrimination standard evolve over time and adapt to the changing circumstances in the industry. Our prior willingness to tolerate the use of monopoly power over transmission to maintain and aggregate the utility's market power over generation occurred in the context of an industry structured largely as vertically integrated regulated monopolies that supplied all facets of utility service—power supply, transmission, and distribution—as a single monopoly service. Competition generally was not meaningfully available as a means to discipline prices and consumer interests were best served by improving efficiencies of the integrated utilities, subject to cost-based regulation.

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[264] *See, e.g., Gulf States Utilities Company v. FPC*, 411 U.S. 747, 758-60 (1973); *FPC v. Conway Corporation*, 426 U.S. 271, 279 (1976); *Northern Natural Gas Company v. FPC*, 399 F.2d 953, 960 (D.C. Cir. 1968).

Today, the circumstances of the industry are radically different. As explained in detail in Section III, a series of significant economic, regulatory, and technical changes in the power industry has introduced the promise of competitively priced power supplies. The profile of electric power suppliers has expanded to include not just the power supply arms of traditional utilities, but also independent power suppliers, affiliated utility power suppliers selling into territories of other franchise utilities, and power marketers.[265] This offers the promise of an increasingly competitive commodity market in electric power, in which significant benefits to consumers can be achieved. In the context of an emerging competitive market in generation, discriminatory practices that once did not constitute undue discrimination must be reviewed to determine whether they are being used to prevent the benefits of competition in generation from being achieved. Here we find conclusively that they are, and use our remedial authority to ensure that they can no longer occur.[266]

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[265] We note that there are now 14 power marketers that are affiliated with public utilities.

[266] We take note of EEI's comments that, at the time of the comments, 30 utilities had filed open access tariffs. They argue, therefore, that the rule is unnecessary. Since their comment was filed, the number of utilities filing some form of an open access tariff has risen to 106. However, while some of these tariffs are based on the NOPR pro forma tariffs, many of these tariffs fall significantly short of the tariff requirements of both the NOPR and this Rule. Even if the tariffs met these requirements, the Rule is still needed to complete the task of eliminating undue discrimination by all public utilities and assuring, to the extent possible, a nationwide open access transmission gr\Id. Indeed, a number of these tariffs were filed for the purposes of securing authority to market power competitively. This underscores markedly our fundamental conclusion that prior practices of using monopoly power over transmission to preserve market power over electricity sales has no place in today's industry and must be eliminated to get the benefits of competition to the customers we are required to protect under the FPA.

* * *

2. Service That Must be Provided by Transmission Provider

In the NOPR, the Commission proposed that a public utility must offer to provide any point-to-point or network transmission service whether or not the utility provides itself that service:

> The Commission therefore proposes that all public utilities must offer both firm and non-firm point-to-point transmission service and firm network transmission service on a non-discriminatory open access basis in accord with the proposed rule and the attached appendix tariffs. The Commission believes that a utility's tariff must offer to provide any point-to-point transmission service and network transmission service that customers need, even though the utility may not provide itself the specific service requested.[291]

EGA and SMUD agree that a transmission owner should offer any transmission service it is able to provide, even if it does not use the service itself.

Public Generating Pool, an association of consumer-owned electric utilities, appears concerned that the Commission may interpret comparability broadly to require a utility to offer the same service provided by another utility or to offer service generally available in a region. Thus, it recommends that a third party seeking more service than a utility provides itself be required to resort to the section 211 process.

Commission Conclusion

Initially, we note that, with the possible exception of small utilities (which may qualify for a waiver, see infra), we have seen no evidence that public utilities are incapable of reasonably providing the services required in the Final Rule pro

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[291] *FERC Statutes and Regulations* ¶ 32,514 at p. 33,079.

forma tariff. Nor have we seen evidence that utilities able to provide these services to themselves are choosing to forego such services. In short, we are not convinced that there is an appreciable difference, if any, among the services required in the pro forma tariff, the services utilities are able to provide, and the services they actually provide themselves.

To the extent these services do differ, however, we explicitly adopt the proposal set forth in the NOPR. Thus, a public utility must offer transmission services that it is reasonably capable of providing, not just those services that it is currently providing to itself or others. Because a public utility that is reasonably capable of providing transmission services may provide itself such services at any time it finds those services desirable, it is irrelevant that it may not be using or providing that service today. Moreover, a public utility must offer these transmission services whether or not other utilities may be able to offer the same services and whether or not such services are generally available in the region (waiver of these requirements for small utilities is discussed in Section IV.K.2.).[292] However, if a customer seeks a customized service not offered in an open access tariff, a customer may, barring successful negotiation for such service, file a section 211 application.

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[292] Requirements for ancillary services are discussed in Section IV.D.

APPENDIX B

Extracts from Order 888-A

62 F.R. 12274 (March 14, 1997)

18 C.F.R. Part 35

[Docket Nos. RM95-8-001 and RM94-7-002; Order No. 888-A]

FERC Stats. & Regs. ¶ 31,048

Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities

(Issued March 4, 1997)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rules, order on rehearing.

* * *

III. Background

In the Final Rule, we detailed the events that led up to this rulemaking, including the significant technical, statutory and regulatory changes that have occurred in the electric industry since the FPA was enacted in 1935.[4] In particular, we focused on the competitive influences of the Public Utility Regulatory Policies Act of 1978, the Congressional mandate in the Energy Policy Act of 1992 to encourage competition in electricity markets, and the need for reform in the industry if consumers are to achieve the benefits that greater competition can bring.

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[4] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,638-52; *mimeo* at pp. 13-51.

In the ten months since the Final Rule issued, competitive changes have escalated at an even faster pace in virtually all areas of the electric industry. These changes are driven not only by the Commission's Final Rule, but also by state restructuring initiatives and by continuing pressures from customers to take advantage of emerging competitive markets and the lower electricity rates they can bring.

All of the existing 166 public utilities that own, control or operate interstate transmission facilities (listed as Group 1 and Group 2 utilities in the Final Rule) have filed the Order No. 888 *pro forma* open-access tariff or requested a waiver of the requirement. Similarly, they either have adopted an electronic information network or requested a waiver of the requirement. Five non-public utilities have submitted reciprocal transmission tariffs and more than 20 have requested a waiver of the reciprocity condition in the *pro forma* tariff.[5]

Significant competitive changes also have accelerated with respect to power pooling, state restructuring initiatives, and Independent System Operators (ISOs). Under Order No. 888 and subsequent implementation orders, the Commission required the filing of revised pooling agreements and joint pool-wide transmission tariffs by December 31, 1996, in order to remedy undue discrimination in transmission services provided through interstate power pooling arrangements. Among the power pool filings were a New England (*NEPOOL*) comprehensive restructuring proposal, a New York proposal,

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[5] As a condition of using a public utility's open-access tariff, any user, including non-public utilities, must offer reciprocal comparable transmission access to the public utility in return. Order No. 888 provides a voluntary mechanism whereby non-public utilities can obtain Commission confirmation that what they are offering meets the tariff reciprocity condition. Non-public utilities also may seek a waiver of the reciprocity condition.

a Pennsylvania-New Jersey- Maryland (PJM) compliance filing and a Western Systems Power Pool filing.

In response to the Commission's encouragement in Order No. 888 of ISOs as a possible means for accomplishing comparable access, a number of utilities and states are well underway in developing this new institution. The fundamental purpose of an ISO is to operate the transmission systems of public utilities in a manner that is independent of any business interest in sales or purchases of electric power by those utilities. The Commission has received several proposals for forming ISOs, one as part of the multi-docketed filing engendered by California's restructuring plan, and others relating to power pool filings. A number of regions are also developing ISO proposals. Some regions previously considering regional transmission groups (RTGs), whose primary purpose is regional planning of transmission facility construction and upgrades, have now broadened their discussions to include an ISO.

Investor-owned utilities in California, at the order of both the state commission and the legislature, have filed proposals with the Commission that would transfer control of transmission facilities to an ISO in conjunction with the formation of a state-wide power exchange to facilitate both wholesale and retail access. While the case presents many complex issues for the Commission to resolve, the California proposal is fundamentally compatible with the pro-competitive open-access requirements of Order Nos. 888 and 889. The Commission's open-access policies therefore have provided a framework for California, and other states, to explore customer choice initiatives.

Other major regions of the country also are instituting ISOs. Member utilities of the PJM Power Pool filed competing ISO proposals with the Commission and are currently working

to reconcile the differences between their proposals. The New York Power Pool recently filed a proposal to create an ISO and a power exchange for New York. The New England Power Pool is exploring a new industry structure for its region that centers on the creation of an ISO. Utilities and other market participants in the Electric Reliability Council of Texas have also formed an ISO. Discussions are underway among utilities from Virginia to Wisconsin in an attempt to create a Midwestern ISO. Members of the Mid-America Power Pool are discussing an ISO proposal. In the Pacific Northwest, utilities are involved in negotiations intended to lead to the formation of an independent grid operator (Indego).

The combined available generation resources of the utilities in these groups is on the order of 428 GW out of a total of approximately 732 GW for total U.S. resources (as of the end of 1996). Thus, assuming these ISO arrangements come to fruition, about three-fifths of the industry may have independent system operators controlling their transmission systems.

Moreover, every state but one has proposed or is considering or developing retail competition programs. For example, New Hampshire, Illinois and Massachusetts began pilot programs in the past year, and retail transmission service for these pilot programs currently is being taken pursuant to tariffs approved by both the state commissions and this Commission. The Massachusetts Department of Public Utilities has sent a proposal to the state legislature calling for retail competition to begin in January 1998. The New York Public Service Commission has issued an order proposing that retail competition begin in early 1998. The New Jersey Board of Public Utilities has issued a proposal permitting customer choice beginning in October of 1998. The Vermont Public Service Board has sent a plan to the legislature recommending that full customer choice begin by the end of 1998. The

Arizona Corporation Commission has adopted rules to phase-in competition over four years, beginning in January 1999. Recently, the Maine Public Utilities Commission issued a final report and recommendation to the legislature for retail competition to begin in January 2000. In addition, Rhode Island and Pennsylvania both have new laws requiring customer choice. These are only a few of the many state initiatives that are under way that will dramatically alter the structure of the electric industry.

Since Order No. 888 was issued, significant efforts also have been made to ensure that reliability of the transmission grid is maintained and that reliability criteria are compatible with competitive markets. The North American Electric Reliability Council (NERC) has continued its efforts to broaden its membership and to fashion reliability requirements to fit a more competitive electric power industry. For example, the NERC Board of Directors voted to require mandatory compliance by all power market participants with its reliability standards. NERC is also establishing new entities called regional security coordinators to oversee the stability of grid operations and to direct the development of an extensive new communications network. Various NERC committees are considering ways to improve the tracking of power transactions, identify the network impacts of transactions, and reflect the actual flow of power over the network when making reservations for transmission service. These efforts are likely to intensify as the industry continues to adapt to competitive changes occurring in the marketplace.

Thus, all segments of the electric industry have taken significant steps in the past year in response to the emerging wholesale competitive markets enabled by Order No. 888 as well as state retail competition initiatives. The competitive framework established by Order No. 888, whose centerpiece is non-discriminatory transmission services and a fair and orderly

stranded cost recovery mechanism, is critical to the successful transition to, and full development of, the industry restructuring proposals that are well underway in all major regions of the country.

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Group Two Section 205 Filings

Union Electric argues that the requirement that Group 2 Public Utilities make section 205 filings is contrary to the voluntary filing scheme inherent in section 205.

Commission Conclusion

Overview

The fundamental legal question before us is the scope of the authority granted to the Commission in 1935 to remedy undue discrimination in interstate transmission services and whether that authority permits us sufficient flexibility to define undue discrimination in light of dramatically changed industry circumstances, in order to provide electricity customers the benefits of more competitively priced power. In the NOPR and Order No. 888, the Commission comprehensively examined case law and legislative history relevant to our authority to order open-access transmission services as a remedy for undue discrimination.[64] We also responded at length in Order No. 888 to arguments that questioned our authority to take this step.[65]

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[64] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,668-73; *mimeo* at pp. 98-112. Notice of Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking, *FERC Statutes and Regulations* ¶32,514 at pp. 33,053-56 (1995).

[65] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,673-79; *mimeo* at pp. 112-129.

On rehearing, as described above, only a few parties continue to question the Commission's authority. As a general matter their rehearings do not raise any arguments, cases, or legislative history not previously considered, and they do not convince us that our action in Order No. 888 is not within our authority under sections 205 and 206 of the FPA. We therefore reaffirm our determination that we have not only the legal authority, but the responsibility, to order the filing of non-discriminatory open-access tariffs if we find such order necessary to remedy undue discrimination or anticompetitive effects.

There are several broad points we wish to emphasize in response to the rehearings that have been filed:

First, there is no dispute that the FPA does not *explicitly* give this Commission authority to order, *sua sponte*, open-access transmission services by public utilities. However, the fact remains that the FPA does explicitly require this Commission to remedy undue discrimination by public utilities.[66] The finding of the D.C. Circuit in the *AGD* case, with regard to sections 4 and 5 of the NGA (which parallel sections 205 and 206 of the FPA), are equally applicable here: the Act "fairly bristles" with concerns regarding undue discrimination and it would turn statutory construction on its head to let the failure to grant a general power prevail over the affirmative grant of a specific one.[67]

Second, there also is no dispute that before Congress enacted the FPA in 1935, it rejected provisions that would have explicitly granted the Commission authority to order

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[66] *See FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,669-70; *mimeo* at pp. 101-03.

[67] 824 F.2d at p. 998.

transmission to any person if the Commission found it "necessary or desirable in the public interest." However, the fact that Congress rejected an extremely broad common carrier provision does not limit the remedies available to the Commission to enforce the undue discrimination provisions in the FPA.[68]

Third, entities on rehearing understandably have focused on statements in case law that indicate limits on the Commission's wheeling authority. They particularly focus on certain statements by the Supreme Court in *Otter Tail*. The Commission in Order No. 888 fully addressed and considered all relevant case law of which we are aware, including statements in *Otter Tail* and other court cases indicating limitations on our authority.[69] We do not dispute these statements and we recognize limitations on our authorities. However, the fact remains that none of the cases cited, including *Otter Tail*, involved the issue of whether this Commission can order transmission as a remedy for undue discrimination and none addressed industry-wide circumstances such as those before us in Order No. 888.

Fourth, while Congress in 1978 gave the Commission certain case-by-case authority to order transmission access by both public utilities and non-public utilities, and broadened this case-by-case authority in 1992, Congress also specifically provided in section 212(e) of the FPA that the case-by-case authorities were not to be construed as limiting or impairing any authority of the Commission under any other provision of

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[68] *See FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,676-78; *mimeo* at pp. 120-27.

[69] *See FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,668-73; *mimeo* at pp. 98-110.

law.[70] Indeed, the legislative history of EPAct shows that when Congress amended the section 211-212 wheeling provisions and the section 212(e) savings clause in 1992,[71] it was well aware of arguments regarding the scope of the Commission's wheeling authority as a remedy for undue discrimination under section 206. Whereas Congress in 1992 decided to add a flat prohibition on the Commission ordering direct retail wheeling under *any* provision of the FPA, it did not add a prohibition on the Commission ordering wholesale wheeling to remedy undue discrimination under section 206. It instead retained and modified the savings clause. The issue before us, therefore, hinges on the scope of authority given to this Commission to remedy undue discrimination, not on the scope of authority given to us in 1978 and 1992.

The Commission is significantly influenced by the decision and case law discussion by the D.C. Circuit in the *AGD* case. This court opinion contains the most recent and comprehensive discussion of the Commission's legal authority to remedy undue discrimination under NGA provisions that mirror those in the FPA, including the relevant case law concerning the Commission's authority to order transmission under the FPA.[72]

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[70] *See FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,686-87; *mimeo* at pp. 148-49.

[71] The savings clause in section 212(e) originally provided that no provision of section 210 or 211 shall be treated as "limiting, impairing, or otherwise affecting any authority of the Commission under any other provision of law." In 1992, the 212(e) savings clause was amended to provide that sections 210, 211 and 214 "shall not be construed as limiting or impairing any authority of the Commission under any other provision of law."

[72] *AGD*, 824 F.2d at 996-999. *See also FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,668-73, 31,676-78; *mimeo* at pp. 98-110 and 120-27.

The rehearing arguments do not, and we believe cannot, reconcile the *AGD* court's discussion and findings with a conclusion that the Commission cannot under any circumstances (as these parties advocate) order wheeling under sections 205 and 206 to remedy undue discrimination.

In sum, we believe that the essential question of the Commission's legal authority to impose the requirements of Order No. 888 turns on the flexibility of the Commission's remedial authority under sections 205 and 206 of the FPA to remedy undue discrimination. As was true with respect to the natural gas industry, we acknowledge that Commission precedent for many years nurtured the expectation that we would not, under our authority under the FPA, preclude utilities from using their monopoly power over the nation's transmission systems to secure their monopoly position as power suppliers. However, as described at length in Order No. 888, these policies arose in the context of practical, economic, and regulatory circumstances that gave rise to vertically integrated monopolies and little, if any, competition among power suppliers. In this kind of regime, the interests of customers were most effectively served by the kind of cost-based regulatory regime that has prevailed until very recently. The evolution of third-party generation, facilitated by PURPA and significant technological advances, dramatically altered the economics of power production. The enactment of EPAct recognized these changes and established a national policy intended to favor the development of a competitive generation market, so that the efficiencies of the new marketplace will be available to customers in the form of lower costs for electricity. Utility practices that may have been acceptable a few years ago would, if permitted to continue, smother the fledgling competitive wholesale markets and undermine the efforts of customers to seek lower-price electricity. We firmly believe that our authorities under the FPA not only permit us to adapt

to changing economic realities in the electric industry, but also require us to do so, if that is necessary to eliminate undue discrimination and protect electricity customers.

Specific Arguments[73]

The Factual Circumstances Underlying AGD Do Not Mandate a Different Conclusion In This Proceeding

Both Union Electric and Carolina P&L argue that the Commission cannot rely on *AGD* in support of its actions in the electric industry, and they attempt to distinguish the legal basis on which the Commission acted in requiring open access transportation for gas pipelines. Specifically, they argue that *AGD* (Order No. 436) [*FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶30,665]) pertained to *voluntary* actions by gas pipelines and that the Commission's imposition of open access requirements was a *condition* of certificate authorizations to transport gas, whereas the Commission's action in Order No. 888 is a direct mandate.[74] We believe this is a distinction without a difference. While it is true that the Commission required open access as a condition of granting blanket authorizations for pipelines and authorizations for pipelines authorizing pipelines to transport natural gas,[75] the critical point is that in both Order No. 436 and Order No. 888 the Commission's actions hinged as a legal matter on the parallel provisions of the NGA (sections 4 and 5) and the FPA (sections 205 and 206) that prohibit undue discrimination. Whether persons are seeking to transport

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[73] We do not repeat our lengthy legal analyses in Order No. 888, but discuss only those arguments that warrant further discussion.

[74] *See Union Electric and Carolina P&L.*

[75] These authorizations are issued under section 7 of the Natural Gas Act and section 311 of the Natural Gas Policy Act.

natural gas or wheel electric power in interstate commerce, by law they must not unduly discriminate or grant undue preference.[76]

In *AGD*, the court upheld the Commission's reliance upon sections 4 and 5 of the NGA to impose an open-access commitment on any pipeline that secured a blanket certificate to provide gas transportation under section 7 of the NGA or provided transportation under section 311 of the NGPA.[77] Order No. 436 was not a simple order that relied on the "voluntary actions" of affected pipelines. As the court in *AGD* understood:

> The Order envisages a complete restructuring of the natural gas industry. It may well come to rank with the three great regulatory milestones of the industry. . . .

At stake is the role of interstate natural gas pipelines. Although they are obviously transporters of gas, they have until recently operated primarily as gas merchants. They buy gas from producers at the wellhead and resell it, mainly to local distribution companies ("LDCs") but also to relatively large end-users. The Commission has concluded that a prevailing pipeline practice—particularly their general refusal to transport gas for third parties where to do so would displace their own sales—has caused serious market distortions. It has found this practice "unduly discriminatory" within the meaning of § 5 of the NGA. Order 436 is its response.

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[76] While there is a difference in the statutes in that natural gas transporters must obtain a certificate from the Commission before they can transport gas, there is *no* difference in the statutory standard applied to the interstate service.

[77] 824 F.2d at 997-98. The court also noted the Commission's reliance on section 16 of the NGA.

The essence of Order No. 436 is a tendency, in the industry metaphor, to "unbundle" the pipelines' transportation and merchant roles. If it is effective, the pipelines will transport the gas with which their own sales compete; competition from other gas sellers (producers or traders) will give consumers the benefit of a competitive wellhead market.[78]

Indeed, since Order No. 436 issued, virtually all jurisdictional natural gas pipelines became "open access" transporters of natural gas.

In analyzing the Commission's authority to remedy undue discrimination, the court never made the distinctions now being put forth by Union Electric and Carolina P&L. Rather, the court specifically focused on the Commission's authority under section 5 of the NGA and upheld the Commission's authority to remedy undue discrimination in the transportation of natural gas by requiring pipelines transporting natural gas to do so on a non-discriminatory basis.[79] Similarly, the Commission in Order No. 888 found undue discrimination in the transmission of electric energy and required, pursuant to section 206 of the FPA (the FPA provision that parallels section 5 of the NGA), that if public utilities transmit electric energy in interstate commerce, they must do so on a non-discriminatory basis (i.e., offer non-discriminatory open-access transmission).

Moreover, while the Commission may have imposed a "condition" on pipelines obtaining blanket certificates or providing section 311 transportation in Order No. 436, this

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[78] 824 F.2d at 993-94.

[79] For example, as the *AGD* court explained with regard to its discussion of *Maryland People's Counsel v. FERC*, 761 F.2d 780 (D.C. Cir. 1985), "we made it clear that blanket-certificate transportation, unconstrained by any nondiscriminatory access provision, might well require remedial action under § 5." 824 F.2d at 1000.

does not detract from the court's core finding in *AGD* that the Commission had the authority under section 5 of the NGA to remedy undue discrimination by requiring open-access transportation.[80] The Commission chose in Order No. 436 to impose its open-access remedy as a condition to pipelines obtaining a blanket certificate to transport natural gas, but its authority was rooted in the undue discrimination provisions of section 5. Additionally, the practical result of the conditioning was that all jurisdictional pipelines would have to provide open-access transportation, a result that was clearly anticipated by the *AGD* court.[81] Thus, there is no distinction in the result intended, or the result achieved, in either industry; in both cases, the intent was to remedy undue discrimination pursuant to the statutes governing each industry, and in both cases the result was that all transporters/transmitters must agree to open-access non-discriminatory services if they seek to continue owning, controlling or operating monopoly interstate transportation facilities.

Legislative History Behind the FPA and EPAct Does Not Preclude Our Action

We disagree with the arguments that the legislative history behind Part II of the FPA establishes that the Commission

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[80] We disagree with Union Electric that anything in the Commission's brief to the Supreme Court, opposing certiorari of *AGD*, contradicts our conclusion. We recognize, as the Commission explained in that brief, that there is no equivalent to section 7 of the NGA in the FPA. While this puts Order No. 888 on a somewhat different factual basis from *AGD*, it has no material effect on whether we have the authority to remedy undue discrimination by requiring non-discriminatory open access transmission.

[81] *See* 824 F.2d at 993-94 ("The Order envisages a complete restructuring of the natural gas industry. It may well come to rank with the three great regulatory milestones of the industry. . . .").

cannot under any circumstance order wheeling under FPA sections 205 and 206.[82] We examined the legislative history of sections 205 and 206 at length in the NOPR and Order No. 888 and concluded that it supports our authority to order open-access transmission as a remedy for undue discrimination.[83] We also have examined the legislative history of the EPAct amendments to sections 211 and 212 and conclude that Congress in EPAct did not resolve the issue of our authority under sections 205 and 206 and left untouched whatever pre-existing authorities we had under these sections. The parties have raised nothing new on rehearing to persuade us that our interpretation is wrong. However, there are several arguments that we believe warrant further discussion.

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[82] Parties have raised the legislative history of sections 205 and 206, as well as the legislative history of the EPAct amendments to sections 211 and 212.

[83] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,676-78; *mimeo* at pp. 120-27. Notice of Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking, *FERC Statutes and Regulations* ¶32,514 at pp. 33,053-56 (1995). Union Electric points to a statement in the Commission's 1987 brief to the U.S. Supreme Court, opposing certiorari of the *AGD* case; in that brief the Commission pointed out that the Supreme Court had noted, in *Otter Tail*, that the legislative histories of the FPA and NGA are "materially different." As we explained in Order No. 888, we have thoroughly reexamined the legislative histories of the NGA and FPA with respect to this issue and now conclude that there is no material difference as to this issue in the legislative histories of the two statutes. Further, such a difference, whether or not it exists, was not crucial to the fundamental holdings of the *AGD* court and does not preclude that decision from applying equally in the electric industry. *See FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,676-78; *mimeo* at pp. 121-26. We also note that in its brief to the Supreme Court the Commission explicitly stated that neither *Otter Tail* nor any of the other electric cases cited "presented the question whether the Commission could order wheeling to remedy undue discrimination or anticompetitive behavior. . . ." FERC Brief at p. 25 (footnote omitted).

Parties on rehearing argue that the existence of sections 211 and 212 limit the Commission's wheeling authority and, in effect, remove our authority under section 206 to order any transmission as a remedy for undue discrimination.[84] We disagree. In enacting EPAct, Congress did not resolve the extent of our wheeling authority outside the context of sections 211 and 212.[85] As we explained above, while Congress in 1978 gave the Commission certain case-by-case authority to order transmission access, it also specifically provided in section 212(e) of the FPA that the case-by-case authorities were not to be construed as limiting or impairing any authority of the Commission under any other provision of law. Congress retained a similar savings clause when it amended sections 211 and 212 in 1992. Moreover, the legislative history of EPAct shows that when Congress amended sections 211 and 212, it was well aware of arguments regarding the scope of the Commission's remedial authority under section 206.[86] Whereas Congress added an amendment prohibiting the Commission from ordering direct retail wheeling under *any* provision of the FPA, it chose not to add a prohibition on the Commission

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[84] *See* discussion *supra* concerning *AGD* court's understanding that Order No. 436 [*FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶30,665] was not a simple order that relied on voluntary actions of affected pipelines.

[85] Contrary to certain assertions, in Order No. 888 we viewed the statute as a whole and determined that section 211 in no way limited the broad authority Congress gave us to eradicate undue discrimination in the electric power industry.

[86] *See* note 71 and related discussion, *supra.*

ordering wholesale wheeling as a remedy for undue discrimination under sections 205 and 206.[87]

We are not persuaded that this conclusion is wrong based on rehearing arguments that we ignored other legislative history of EPAct. Carolina P&L argues that we ignored various statements of Senator Wallop following the enactment of EPAct, which it alleges are counter to our claim of authority to order open-access transmission as a remedy for undue discrimination. The utility is simply in error that we ignored these statements. We explicitly mentioned Senator Wallop's statements in Order No. 888 and gave our rationale for why section 211 does not limit our authority to remedy undue discrimination.[88] However, we believe it is important to elaborate on the context in which those statements were made and our interpretation of those statements.

The primary focus of Senator Wallop's statements is on the transmission authority given by the EPAct amendments to sections 211 and 212. These statements emphasize restrictions on our section 211 wheeling authority, including the fact that section 211 does not give the Commission authority to order transmission access on its own motion or to order open-access

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[87] In response to Carolina P&L's argument that Congress gave the Commission a specific remedy under section 211 and the Commission should not presume that it has additional remedies in such a circumstance, we do not believe that section 211 can credibly be viewed either as a partial substitute for, or as superseding, the sections 205-206 undue discrimination remedial authority that is fundamental to the Federal Power Act. Indeed, section 211 is not written in terms of providing remedial authority to address undue discrimination but rather provides for case-by-case transmission service on request if the service is in the public interest and meets the other criteria in sections 211 and 212.

[88] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,686-87; *mimeo* at 148-51.

transmission.[89] We do not quarrel with these statements because sections 211 and 212 clearly do place restrictions on our authority to order access under those provisions. The statements also discuss the differences between the House introduced amendments to sections 211 and 212 (which would have provided broader and in some instances mandatory access authority) and the amendments that finally passed (which were more limited). We also do not disagree that changes were made to the bill that originally was introduced. At issue here, however, is not whether there are restrictions on our section 211 authority, but rather whether we have authority *outside the context of section 211* to order transmission as a remedy for undue discrimination. The only statement among Senator Wallop's remarks that addresses this specific issue is one in which he says, "*In my opinion*, neither the amendments made by this Act *nor existing law* give the FERC any authority to mandate open-access transmission tariffs for electrical utilities." (emphasis added). We do not view one senator's opinion as in any way dispositive of the issue. As discussed *supra*, when Congress enacted the 1992 section 211 amendments it was well aware of the outstanding legal issue of the Commission's authority to order access as a remedy for undue discrimination under section 206. It chose not to clarify this issue by prohibiting the Commission from ordering access, but instead retained the savings clause in section 212(e).

The issue of our legal authority thus turns on the undue discrimination authority given to us in 1935, and the legislative history of sections 205 and 206. We discussed this at length in

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[89] Most of the statements talk in terms of "The Conference Report provides. . . ." and thus are referring only to the section 211 and 212 provisions. *See, e.g., 138 Cong. Rec. 517616 (Oct. 8, 1992).*

Order No. 888.[90] On rehearing, several entities emphasize the *Otter Tail* case and the legislative history referred to in that case. In particular, Union Electric recites Justice Stewart's discussion of the legislative history in his partial dissent in *Otter Tail*. We do not interpret that discussion to suggest that we do not have the authority to remedy undue discrimination by requiring open-access transmission under any circumstance. As we explained in Order No. 888:

> In the FPA, while Congress elected not to impose common carrier status on the electric power industry, it tempered that determination by explicitly providing the Commission with the authority to eradicate undue discrimination—one of the goals of common carriage regulation. By providing this broad authority to the Commission, it assured itself that in preserving "the voluntary action of the utilities" it was not allowing this voluntary action to be unfettered. It would be far-reaching indeed to conclude that *Otter Tail*, which was a civil antitrust suit that raised issues entirely unrelated to our authority under section 206, is an impediment to achieving one of the primary goals of the FPA—eradicating undue discrimination in transmission in interstate commerce in the electric power industry. [91]

In response to Union Electric's arguments that Congress explicitly rejected common carrier provisions in 1935, we do not disagree with Union Electric's statement that "the mandatory wheeling language was not dropped

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[90] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,676-78; *mimeo* at pp. 120-27.

[91] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,670; *mimeo* at p. 103.

inadvertently."[92] The point that we made in Order No. 888 (quoting *AGD*) in this regard was that

> (1) "Congress declined *itself* to impose *common carrier status*" (emphasis added) and (2) there is no "support for the idea that the Commission could under no circumstances whatsoever impose obligations encompassing the core of a common carriage duty." [93]

Nowhere did we ever suggest that the mandatory wheeling language was dropped inadvertently; we simply distinguish a general common carrier obligation imposed "in the public interest" from an obligation to provide transmission service deemed necessary to eliminate undue discrimination. Finally, we fully agree with Union Electric's statement that

> [a]lthough this "first Federal effort" occurred in 1935, the resulting FPA sections 205 and 206 have not been modified in any relevant respect since that time. Therefore, the range of authority conveyed to the Commission in such sections remains the same today as it did then. [94]

We never suggested otherwise and our conclusion in Order No. 888 is not based on a finding to the contrary.

Case Law Does Not Prohibit Our Ordering Wheeling Under Sections 205 and 206 of the FPA

Union Electric, discussing the very cases cited by the Commission in Order No. 888, asserts that "the Commission fails to recognize their dispositive results prohibiting it from

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92 Union Electric at p. 26.

93 *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,677; *mimeo* at p. 122.

94 Union Electric at p. 27.

ordering wheeling under the sections 205 and 206 of the FPA."[95] We thoroughly examined all of the case law cited by Union Electric, as evidenced by our discussions in the NOPR and Order No. 888, and disagree that any of those cases prohibit the Commission from ordering wheeling under sections 205 and 206 of the FPA to remedy undue discrimination. Indeed, the *AGD* court reached the same conclusion.[96]

Union Electric further cites to a variety of FPC cases that it claims demonstrate that the Final Rule exceeds the Commission's statutory authority.[97] It appears to have proffered every negative Commission statement it could find with respect to our authority to order wheeling under Part II of the FPA. As in the Commission cases cited, we recognize that our authority to order transmission service is not unbounded; if we order transmission, it must be within the scope of authority available to us under the FPA. However, the fact is that none of the cases cited as establishing limits on the Commission's authority addresses the issue before us now, i.e., the Commission's authority to order transmission as a remedy for undue discrimination. Simply stated, the Commission has never before been faced with generic findings of undue discrimination in the provision of interstate electric

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[95] Union Electric at p. 30.

[96] The only relevant case the *AGD* court did not discuss was *NYSEG*. As we explained in Order No. 888, presumably this was because the case did not concern whether the Commission could order wheeling as a remedy for undue discrimination. *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,672 n.217; *mimeo* at p. 108 n.217.

[97] Union Electric at pp. 33-37.

transmission services, and the extent of its authority to remedy that undue discrimination.

The Commission's General Counsel Never Asserted, or Even Suggested, That the Commission Does Not Have the Authority to Order Wheeling as a Remedy for Undue Discrimination

Union Electric spends several pages of its rehearing request asserting that the Commission's own General Counsel has acknowledged the limitations on the Commission's authority to order wheeling.[98] In particular, it points to a statement by a Commission OGC witness that "'if Congress intends for the Commission to be able to deal with transmission on its own motion and thereby go further than simply dealing with industry proposals,' Congress would need 'to include an affirmative statement somewhere in the Act that the Commission could require wheeling on its own motion.'"[99] This same statement was previously raised by EEI and previously addressed in Order No. 888. We do not disagree that this statement was made. However, it must be read in the context of the witness' entire testimony in which the witness stated *four* times the view that the case law supports the argument that the Commission has authority to order wheeling as a remedy for undue discrimination.[100] Indeed, contrary to

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[98] Union Electric at pp. 37-40.

[99] Union Electric at pp. 38-39.

[100] Hearings on H.R. 1301, H.R. 1543, and H.R. 2224 before the Subcommittee on Energy and Power of the House Committee on Energy and Commerce, 102d Cong., 1st Sess. (May 1, 2 and June 26, 1991), Statement of Cynthia A. Marlette, Associate General Counsel, Federal Energy Regulatory Commission, Report No. 102-60 at p. 60 ("However, as discussed below, there are strong legal arguments that the Commission's obligation to protect against undue discrimination carries with it the

Union Electric's assertion, the extensive legal analysis set forth by the Commission's witness supports the position relied upon in this proceeding.[101] Thus, viewed in the context of the witness' entire testimony, Union Electric's arguments to the contrary are unavailing. Moreover, nowhere did the witness ever suggest, as asserted by Union Electric, that FPA sections 205 and 206 could only be used "to eliminate unduly discriminatory terms in a wheeling arrangement voluntarily filed with the Commission."[102]

The Commission Has the Authority to Order Public Utilities to Make Rate Filings in This Proceeding

We reject Union Electric's argument that our requirement that Group 2 Public Utilities make section 205 filings is

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authority to impose transmission requirements as a remedy for undue preference or discrimination." "As discussed below, although the case law in this area has been uncertain, in OGC's opinion there is a strong legal argument that the Commission can require transmission as a remedy for undue preference or undue discrimination."); at pp. 69-70 ("The weight of the limited case law, particularly the *AGD* opinion, supports authority to order wheeling as a remedy for undue discrimination where substantial evidence exists."); at p. 106 ("I believe that we have substantial authority under the existing case law to mandate access where necessary to remedy anticompetitive effects.").

[101] The statement quoted was preceded by a legal analysis of the Commission's authorities under then existing law, including section 206, and a statement that an examination of the Commission's *full* authorities might further open up the industry. Further, it was made in the context of case-by-case industry proposals and the Commission's inability to require case-by-case wheeling on its own motion. It did not address section 206 authority to remedy undue discrimination.

[102] Union Electric at p. 39. We note that Union Electric did not cite to any page or particular language to support its assertion.

contrary to the voluntary filing scheme inherent in section 205. It is true that the Commission ordinarily cannot require a utility to make a section 205 filing. However, in this situation the section 205 filing was required as a remedy under section 206 of the FPA to establish rates for non-discriminatory open-access transmission. Acting pursuant to section 206 of the FPA, we found that undue discrimination exists in the wholesale transmission of electric power and ordered the filing of non-discriminatory open-access transmission tariffs to remedy this discrimination. Section 206 further requires that upon such a finding the Commission "shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force. . . ." Thus, we had the authority to set the rates that would be observed and in force following the effectiveness of open-access transmission and initially proposed to set rates for each public utility. However, rather than take this intrusive approach, which necessarily would have required a number of generic assumptions and resulted in less than public utility-specific rates, upon issuance of the Final Rule, we chose to permit these public utilities to make section 205 filings to propose their own rates for the services provided in the *pro forma* tariff.

The Commission's Prior Failure to Order Wheeling as a Remedy for Undue Discrimination Is Not Dispositive

After discussing several cases that it asserts address the Commission's authority to remedy undue discrimination, Carolina P&L declares that "[p]erhaps the strongest evidence that the Commission lacks the power to compel wheeling under FPA section 206 is the fact that the Commission has never previously exercised this alleged power, despite numerous

opportunities to do so."[103] However, the court in *AGD* succinctly dismissed a similar argument:

> It is finally argued that the Commission's not having imposed any requirements like those of Order No. 436 in the period from enactment in 1938 until the present demonstrates the lack of any power to do so. . . . But as our introductory review of the economic background sought to illustrate, the Commission here deals with conditions that are altogether new. Thus no inference may be drawn from prior non-use. [104]

Undue Discrimination/Anticompetitive Effects[105]

A number of utilities and state commissions argue that the Commission lacks evidence to support a finding of undue discrimination.[106]

VA Com argues that the Commission failed to make a legally supportable finding of industry-wide undue discrimination: "FERC apparently drew a conclusion that there was undue discrimination in the NOPR without support and later accepted customers' allegations, without further inquiry, and relied on them in making its finding of industry-wide undue discrimination." (VA Com at pp. 2-3).

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[103] Carolina P&L at pp. 35-36.

[104] 824 F.2d at 1001. In this regard, we acknowledge that our view of what constitutes undue discrimination has evolved significantly in light of the dramatic economic changes in the industry, as described briefly above and more fully in Order No. 888.

[105] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,682-84; *mimeo* at pp. 136-42.

[106] *E.g.*, El Paso, Union Electric, Carolina P&L, VA Com, FL Com, PA Com.

PA Com and Carolina P&L assert that allegations of undue discrimination do not form a sufficient basis to compel a generic rulemaking. Not coming forward with specific accusations and the identity of specific accusers, PA Com asserts, is unconstitutional as a deprivation of due process.

With regard to specific allegations of undue discrimination, SoCal Edison argues that the Commission inappropriately relied upon allegations involving SoCal Edison as evidence of undue discrimination. SoCal Edison asks that the Commission declare that it is not making a factual determination as to any particular allegation especially since prior to 1994 the Commission defined discrimination differently. Dalton similarly argues that the Commission has no basis for finding that Georgia Power Company is engaged in unlawful undue discrimination as to new or roll-over transmission services in the operation of the Integrated Transmission System in Georgia (ITS) under the ITS agreement. Moreover, Dalton argues, even if it is found that GPC acted in unduly discriminatory manner, it is not practical or lawful to order open-access tariff for new and roll-over services.

Finally, Carolina P&L argues that the comparability standard does not eliminate the "requirement" that parties must be similarly situated before discrimination is present, and that the Commission has not provided factual support for its implicit finding that public utilities and their native load customers are similarly situated to third parties. It cites *City of Vernon v. FERC,* 845 F.2d 1042 at 1045-46 (D.C. Cir. 1988), in support.

Commission Conclusion

As an initial matter, the Commission grants SoCal Edison's request for clarification that in Order No. 888 we did not make a factual determination as to any particular allegation

of past discrimination described in the Final Rule.[107] However, we reject arguments that the Commission cannot rely in part on the array of allegations and circumstances raised by customers in individual cases over the years and brought forth in response to the NOPR. The specific allegations are illustrative. However, they present examples of the types of discriminatory incentives and behavior inherent in ownership of monopoly transmission facilities, and also present credible examples of the types of discriminatory behavior in which public utilities could engage in the future. We also reject arguments that customers and the Commission must litigate and make specific findings of discrimination against each public utility before we can take any action to preclude discriminatory behavior that will harm competition and, ultimately, electricity consumers. This is particularly true where the discriminatory behavior clearly is in the economic self-interest of a monopoly transmission owner facing the markedly increased competitive pressures that are driving today's electric utility industry. As we recognized in Order No. 888,

> [t]he inherent characteristics of monopolists make it inevitable that they will act in their own self-interest to the detriment of others by refusing transmission and/or providing inferior transmission to competitors in the bulk power markets to favor their own generation, and it is our duty to eradicate unduly discriminatory practices. As the *AGD* court stated: "Agencies do not need to conduct

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[107] In response to PA Com's and Carolina P&L's assertions that not coming forward with specific accusations and identities of specific accusers is unconstitutional and a deprivation of due process, we emphasize that the Commission has not denied due process to anyone. The Final Rule does not, nor is it intended to, make specific findings as to any particular utility or any particular allegation raised.

experiments in order to rely on the prediction that an unsupported stone will fall."[108]

We believe that the same general discriminatory circumstances that faced us when we required open-access transportation in the natural gas industry[109] are also before us today in the electric industry. First, it is uncontested that market power continues to exist in the ownership and operation of the monopoly-owned facilities that comprise the nation's interstate transmission grid. Second, utilities, as a general matter, did not in the past offer comparable transmission services to competitors or to customers. Open-access services simply were not made available by utilities until the late 1980s when the Commission began to impose open access as a condition of approval of market-based rates and utility mergers in order to mitigate market power and remedy anticompetitive effects. Rather, the vast majority of utilities historically have declined to transport electric energy that would compete with their own sales or have offered access that is inferior to what they use for their own sales. Third, discrimination in transmission services, when viewed in light of utilities' own uses of their transmission systems compared to what they offer third parties, has denied and will continue to deny customers access to electricity at the lowest reasonable rates. The entities on rehearing have raised nothing to persuade us that it is in the interests of consumers to maintain the self-evident incentives for transmission owners to exercise their monopoly power over transmission to discriminate in favor of their own generation sales—incentives that will only increase in the future as competitive pressures continue to escalate.

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[108] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,682; *mimeo* at pp. 136-37.

[109] See *AGD*, 824 F.2d at 999-1000.

The Commission addressed the same argument as that being made by Carolina P&L, that the Commission has not made the requisite finding that third-party transmission customers are similarly situated to public utilities and their native load customers, in 1994 in the *NEPOOL* and *AEP* cases.[110] In these cases, we recognized that the traditional focus of our undue discrimination analysis had been whether factual differences justify different rates, terms and conditions for similarly situated customers, but concluded that due to changing conditions in the electric utility industry, it was necessary to reevaluate our traditional analysis. As we stated in *NEPOOL*, the focal point of undue discrimination claims has shifted from claims of undue discrimination in rates and services which the utility offers different customers to claims of undue discrimination in rates and services which the utility offers when compared to its own use of the transmission system.[111] "In this context, framing the analysis in terms of how a public utility treats similarly situated customers is not applicable or instructive."[112] The Commission concluded that it therefore must reexamine its application of the standard for undue discrimination claims under sections 205 and 206 of the FPA.

The Commission further elaborated on its re-examination of undue discrimination in *AEP*. The Commission cited its *NEPOOL* discussion and set for hearing the different uses that AEP made of its transmission system and whether there were

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[110] *New England Power Pool*, 67 FERC ¶61,402 (1994) *(NEPOOL)*; *American Electric Power Service Corporation*, 64 FERC ¶61,279 (1993), *reh'g granted*, 67 FERC ¶61,168, *clarified*, 67 FERC ¶61,317 (1994) *(AEP)*.

[111] 67 FERC ¶61,042 at p. 61,132.

[112] *Id.*

any operational differences between any particular use that AEP made of the system and the use third parties might need, and, in particular, the degree of flexibility AEP accorded itself in using its transmission system for different purposes. The Commission subsequently set the same issue for hearing in several other cases.[113] In the NOPR, however, the Commission concluded that based on what it had learned in the ongoing cases, it would address this issue generically in this rulemaking. We announced in the NOPR our belief that all utilities use their own systems in two basic ways: to provide themselves point-to-point transmission service that supports coordination sales, and to provide themselves network transmission service that supports the economic dispatch of their own generation units and purchased power resources (integrating their resources to meet their internal load). Third parties may need one or both of these basic uses in order to obtain competitively priced generation or to have the opportunity to be competitive sellers of power, and the Commission proposed that all public utilities must offer both services on a non-discriminatory open-access basis.[114]

We affirmed this determination in the Final Rule. We concluded that a public utility must offer transmission services that it is reasonably capable of providing, not just those services that it is currently providing to itself or others. Because a public utility that is reasonably capable of providing transmission services may provide itself such services at any time it finds those services desirable, it is irrelevant that it may

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[113] *Commonwealth Edison Co.*, 70 FERC ¶61,204 (1995); *Wisconsin Electric Power Co.*, 70 FERC ¶61,074 (1995); and *Wisconsin Public Service Corp.*, 70 FERC ¶61,075 (1995).

[114] *FERC Statutes and Regulations* ¶32,524 at p. 33,079.

not be using or providing that service today.[115] Thus, based on the analysis in this record, the Commission has determined that undue discrimination in the provision of transmission services in today's industry does not turn on whether utilities and their native load customers are similarly situated to third parties, but instead turns on whether the utility is providing comparable service, that is, service that it is reasonably capable of providing to other users of the interstate transmission system.

In short, the Commission is not bound to a static application of its undue discrimination analysis under the FPA and, indeed, has a public interest responsibility to reexamine undue discrimination in light of changed circumstances in the industry.[116] That is what we began in *NEPOOL* and *AEP* and have completed in this rulemaking. The traditional "similarly situated" test, while applicable to discrimination among third-party customers, simply is not applicable when analyzing discrimination between third-party transmission customers and transmission owners. Under Carolina P&L's theory, presumably the only customers that could be shown to be similarly situated would be those who own monopoly transmission facilities and have native load (i.e., captive) customers. This would preserve customer captivity, perpetuate monopoly power and profits, and deny the lowest reasonable

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[115] *FERC Statutes and Regulations* at p. 31,690; *mimeo* at p. 160.

[116] There is no "requirement" in the FPA that the Commission apply a "similarly situated" test. Carolina P&L's reliance on *City of Vernon* is misplaced. That case involved a claim of discrimination in the type of service offered to a wholesale customer versus that offered to retail customers, and the Commission's application of the "similarly situated" and "same service" test. Contrary to Carolina P&L's implication, the case does not hold that the Commission is bound to apply a "similarly situated" test in analyzing undue discrimination claims under the FPA.

rates to consumers. We therefore reject Carolina P&L's arguments.

Moreover, the fact that public utilities and their native load customers have been treated differently from third-party transmission customers because they are not among those traditionally considered to be "similarly situated" is precisely the target at which Order No. 888 takes aim. Historically, competitively-priced power was not broadly available to wholesale customers because the industry was dominated by vertically integrated IOUs[117] and, to the extent cheaper generation alternatives were available in the marketplace, transmission owners either took the cheaper power for their own uses or purchased and re-sold it at a profit.[118] Prior to EPAct, most power customers took power from the vertically integrated utilities that provided their transmission service. Transmission-only transactions played a secondary role in bulk power markets, facilitating certain economy transactions and coordination and pooling arrangements that improved utility operational efficiencies, largely as a complement to bundled bulk power transactions. Given the predominantly vertically-integrated industry and efficiencies that could be gained through encouragement of coordination and pooling transactions, the Commission was willing to accept utility practices that provided third parties with transmission services that were distinctly inferior to the utility's own uses of the transmission system.

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[117] *I.e.*, investor-owned utilities that owned generation, transmission and distribution facilities and most of whom had captive customers.

[118] Very simply, the transmission owner was able to prevent third parties from achieving the maximum savings possible in the generation market by withholding or delaying transmission service. Alternatively, the transmission owner could purchase the power and resell it to the third party at a rate that reflected a mark-up from the first power sale.

In the future, however, unbundled transmission service will be the centerpiece of a freely traded commodity market in electricity, in which all wholesale customers can shop for power. In a market characterized by a significant increase in non-vertically integrated power suppliers and competitively priced power that is now meaningfully available, it is no longer in the interest of wholesale customers for the Commission to tolerate the types of practices that were previously accepted. We cannot allow what have become unduly discriminatory practices to erect barriers between customers and the rapidly emerging competitive electricity marketplace. Accordingly, a primary goal of Order No. 888 is to provide that in the future transmission providers and third-party transmission customers are "similarly situated" in the quality of transmission service available to them.

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3. Who Must Provide Non-discriminatory Open-Access Transmission

In the Final Rule, the Commission explained that its authority under sections 205 and 206 of the FPA permits it to require only public utilities to file open-access tariffs as a remedy for undue discrimination.[135] The Commission further explained that it has no authority under those sections of the FPA to require non-public utilities to file tariffs with the Commission.

The Commission also discussed three mechanisms that would help alleviate the problems associated with not being able to require non-public utilities to provide open access: (1) broad application of section 211; (2) the reciprocity

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[135] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,691-92; *mimeo* at pp. 162-65.

requirement set forth in the Final Rule; and (3) the formation of RTGs.

The Commission also indicated that it will not allow public utilities that jointly own interstate transmission facilities with non-jurisdictional entities to escape the requirements of open access. Thus, the Commission required each public utility that owns interstate transmission facilities jointly with a non-jurisdictional entity to offer service over its share of the joint facilities, even if the joint ownership contract prohibits service to third parties. The Commission required the public utilities, in a section 206 compliance filing, to file with the Commission, by December 31, 1996, a proposed revision (mutually agreeable or unilateral) to their contracts with non-jurisdictional owners.

Rehearing Requests

Jointly-Owned Facilities

Union Electric argues that the Final Rule improperly requires a public utility to unilaterally file a modification to agreements that a non-jurisdictional entity opposes, which amounts to a litigation coercion provision. Union Electric notes that it has been told by Associated Electric Cooperative, Inc. that it will oppose any modifications to Union Electric's agreements. Union Electric further states that these facilities are not commonly owned, but rather each party wholly owns its segment of the facilities.

Dalton asserts that Georgia Power Company cannot comply with the requirement to offer service over its share of joint facilities because the ITS is not owned by members as tenants in common, but instead each member owns specific segments of the transmission grid. Dalton further argues that it is unjust and unreasonable to require Georgia Power Company to give access to the ITS to new and roll-over transmission customers under the Order No. 888 tariff that are unwilling to

accept an investment responsibility and an obligation to make balancing payments.

Associated EC argues that the Commission may modify non-jurisdictional contracts only under section 211 of the FPA; the Commission cannot simply modify the contract with respect to the public utility.

NE Public Power District states that it is party to an agreement with a public utility involving jointly constructed transmission facilities that prohibits use of the transmission capacity by a non-party. It asserts that "[t]he District's contractual rights under its contract constitute valuable property, and the summary annulment of those rights constitutes a violation of Due Process." (NE Public Power District at p. 18-20). Moreover, it argues that blanket invalidation of the terms and conditions of the contracts is contrary to the *Sierra-Mobile* doctrine.

Commission Conclusion

We reject those arguments that maintain that the Commission cannot properly require a public utility to file unilaterally a modification to agreements concerning joint transmission facilities that a non-jurisdictional entity opposes. It is without question that the Commission has the exclusive authority to regulate public utilities engaged in the sale for resale and/or transmission of electric energy in interstate commerce to assure that rates, terms and conditions are just and reasonable and not unduly discriminatory. The fact that a public utility may jointly own, with a non-jurisdictional entity, transmission facilities through which it engages in sales for resale and/or transmission of electric energy in interstate commerce does not alter the Commission's

authority to regulate that public utility.[136] If the Commission finds that a matter needs to be remedied, it may issue an order directed at the public utility. The fact that such an order may affect a non-jurisdictional joint owner does not undermine the validity of the Commission's order.[137] Otherwise, a public utility could simply enter into joint agreements with non-jurisdictional utilities to the frustration of the Commission's mandate to protect consumers from undue discrimination.[138]

Nor does the exercise of the Commission's powers under the FPA to remedy undue discrimination by public utilities constitute a violation of due process vis-a-vis the non-jurisdictional entity. When the contract was entered into and filed with the Commission it was with the explicit knowledge that the Commission could regulate the rates, terms and conditions of the contract with respect to the jurisdictional services provided thereunder by the public utility. If and when a public utility unilaterally files either to amend or terminate the agreement, the non-jurisdictional party is free to raise any arguments it wishes to support its position that no changes are necessary to ensure that the contract is just and reasonable and not unduly discriminatory or preferential.

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[136] See Policy Statement Regarding Regional Transmission Groups, 64 FERC ¶61,139 at p. 61,993 (1993); *Midwest Power Systems, Inc.*, 69 FERC ¶61,025 at pp. 61,104-05 (1994). Nor does the form of ownership of the joint facilities have any bearing on the Commission's jurisdiction over public utilities.

[137] Though the non-jurisdictional entity would not become subject to Commission regulation.

[138] *Cf. H.K. Porter Co., Inc. v. Central Vermont Railway, Inc.*, 366 U.S. 272, 273-75 (1961).

APPENDIX C

STATUTORY PROVISIONS INVOLVED

Extracts from the

		Page
1.	**Administrative Procedure Act**	**99a**
2.	**Federal Power Act**	**100a**
3.	**Natural Gas Act**	**106a**

1. ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. § 706 Scope of Review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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2. FEDERAL POWER ACT

PART II–REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

Declaration of Policy; Application of Part; Definitions

16 U.S.C. §824 **(Section 201)** (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b)(1) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

* * *

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part (other than facilities subject to such jurisdiction solely by reason of section 210, 211, or 212).

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a state, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

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Rates and Charges; Schedules; Suspension of New Rates

16 U.S.C. §824d **(Sec. 205)** (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage; or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

* * *

Fixing Rates and Charges; Determination of Cost of Production or Transportation

16 U.S.C. §824a **(Sec. 206)** (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charges, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

* * *

Wheeling Authority

16 U.S.C. §824j **(Sec. 211)** (a) TRANSMISSION SERVICE BY ANY ELECTRIC UTILITY; NOTICE, HEARING AND FINDINGS BY COMMISSION—Any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale, may apply to the Commission for an order under this subsection requiring a transmitting utility to provide transmission services (including any enlargement of transmission capacity necessary to provide such services) to the applicant. Upon receipt of such application, after public notice and notice to each affected State regulatory authority, each

affected electric utility, and each affected Federal power marketing agency, and after affording an opportunity for an evidentiary hearing, the Commission may issue such order if it finds that such order meets the requirements of section 212, and would otherwise be in the public interest. No order may be issued under this subsection unless the applicant has made a request for transmission services to the transmitting utility that would be the subject of such order at least 60 days prior to its filing of an application for such order.

(b) RELIABILITY OF ELECTRIC SERVICE—No order may be issued under this section or section 210 if, after giving consideration to consistently applied regional or national reliability standards, guidelines, or criteria, the Commission finds that such order would unreasonably impair the continued reliability of electric systems affected by the order.

(c) REPLACEMENT OF ELECTRIC ENERGY—(1) [Removed.]

(2) No order may be issued under subsection (a) or (b) which requires the transmitting utility subject to the order to transmit, during any period, an amount of electric energy which replaces any amount of electric energy—

(A) required to be provided to such applicant pursuant to a contract during such period; or

(B) currently provided to the applicant by the utility subject to the order pursuant to a rate schedule on file during such period with the Commission: *Provided*, That nothing in this subparagraph shall prevent an application for an order hereunder to be filed prior to termination of modification of an existing rate schedule: *Provided*, That such order shall not become effective until termination of such rate schedule or the modification becomes effective.

(d) TERMINATION OR MODIFICATION OF ORDER; NOTICE, HEARING AND FINDINGS OF COMMISSION; CONTENTS OF ORDER; INCLUSION IN ORDER OF TERMS AND CONDITIONS AGREED UPON BY PARTIES—(1) Any transmitting utility ordered under subsection (a) or (b) of this section to provide transmission services may apply to the Commission for an order permitting such transmitting utility to cease providing all, or any portion of, such services. After public notice, notice to each affected State regulatory authority, each affected Federal power marketing agency, each affected transmitting utility, and each affected electric utility, and after an opportunity for an evidentiary hearing, the Commission shall issue an order terminating or modifying the order issued under subsection (a) or (b) of this section if the electric utility providing such transmission services has demonstrated, and the Commission has found, that—

(A) due to changed circumstances, the requirements applicable, under this section and section 212 to the issuance of an order under subsection (a) or (b) of this section are no longer met, or

(B) any transmission capacity of the utility providing transmission services under such order which was, at the time such order was issued, in excess of the capacity necessary to serve its own customers is no longer in excess of the capacity necessary for such purposes, or

(C) the ordered transmission services require enlargement of transmission capacity and the transmitting utility subject to the order has failed, after making a good faith effort, to obtain the necessary approvals or property rights under applicable Federal, State and local laws.

No order shall be issued under this subsection pursuant to a finding under subparagraph (A) unless the Commission finds that such order is in the public interest.

(2) Any order issued under this subsection terminating or modifying an order issued under subsection (a) or (b) of this section shall—

(A) provide for any appropriate compensation, and

(B) provide the affected electric utilities adequate opportunity and time to—

(i) make suitable alternative arrangements for any transmission services terminated or modified, and

(ii) insure that the interests of ratepayers of such utilities are adequately protected.

(3) No order may be issued under this subsection terminating or modifying any order issued under subsection (a) or (b) if the order under subsection (a) or (b) includes terms and conditions agreed upon by the parties which—

(A) fix a period during which transmission services are to be provided under the order under subsection (a) or (b), or

(B) otherwise provide procedures or methods for terminating or modifying such order (including, if appropriate, the return of the transmission capacity when necessary to take into account an increase, after the issuance of such order, in the needs of the transmitting utility subject to such order for transmission capacity).

(e) "FACILITIES" DEFINED—As used in this section, the term "facilities" means only facilities used for the generation or transmission of electric energy.

* * *

3. NATURAL GAS ACT

Rates and Charges; Schedules; Suspension of New Rates

15 U.S.C. §717c **(Sec. 4)** (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

* * *

Fixing Rate and Charges; Determination of Cost of Production or Transportation

15. U.S.C. §717d **(Sec. 5)** (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in

force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * *

Extension of Facilities; Abandonment of Service

15 U.S.C. §717f **(Sec. 7)** (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate services to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the

Commission first had and obtained after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c)(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied

accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of —

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise

such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f)(1) The Commission, after a hearing had upon its own motion or upon appellation, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another gas company.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) When any holder of a certificate public convenience and necessity cannot acquire by contract, or is unable to agree with the owner or property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the

district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedures in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

* * *

Supreme Court, U.S.
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(3) (2) (4)
Nos. 00-568, 00-800, and 00-809

IN THE

Supreme Court of the United States

PEOPLE OF THE STATE OF NEW YORK AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT TRANSMISSION ACCESS POLICY STUDY GROUP

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9pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES i
ARGUMENT 1
REASONS WHY THE STATES' PETITION SHOULD BE DENIED 2
I. PETITIONER'S FIRST POINT RESTS UPON A PREMISE REJECTED BY THIS COURT AND CONTRARY TO THE RECORD BELOW, AND SEEKS REVIEW OF AN ALTERNATIVE (AND SOUND) HOLDING 2
II. THE STATES' SECOND POINT RESTS UPON THE INVALID PREMISE THAT THE STATES CAN REGULATE WHOLESALE ELECTRIC POWER SALES 4
CONCLUSION 6

TABLE OF AUTHORITIES

Cases:

Arkansas Power & Light Co. v. FPC, 368 F.2d 376 (8th Cir. 1966) 5
Connecticut Light & Power Co. v. FPC, 324 U.S. 515 (1945) 5
Duke Power Co. v. FPC, 401 F.2d 930 (D.C. Cir. 1968) 6
FPC v. Florida Power & Light Co., 404 U.S. 453 (1972) 2,3,4
FPC v. Louisiana Power & Light Co., 406 U.S. 621 (1972) 4
Florida Power & Light Co., 37 F.P.C. 544 (1967), *aff'd*, 404 U.S. 453 (1972) 3
Hillsborough County v. Automated Medical Labs, Inc., 471 U.S. 707 (1985) 4
Massachusetts v. Morash, 490 U.S. 107 (1989) 4

Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988) 4
Northern States Power Co. v. FERC, 176 F.3d 1090 (8th Cir. 1999), *cert denied*, 120 S. Ct. 1221 (U.S. 2000) 4
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 1
Public Utilities Comm'n v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927) 5
Wisconsin-Michigan Power Co. v. FPC, 197 F.2d 472 (7th Cir.1952) 6

Statutes:

Federal Power Act, 16 U.S.C. §§ 792 *et seq.*
16 U.S.C. § 824(a) 2,4
16 U.S.C. § 824(b)(1) 4

ARGUMENT

Respondent Transmission Access Policy Study Group ("TAPS")[1] respectfully requests that this Court deny the petitions of the States and Dalton for writ of certiorari, seeking review of the District of Columbia Circuit's opinion. Because Dalton's petition is without merit and warrants little discussion,[2] TAPS addresses only the States' petition below.[3] TAPS believes that Petitioner Enron Power Marketing, Inc.'s position is correct, but because under the D.C. Circuit's opinion the Federal Energy Regulatory Commission ("FERC") may choose to exercise jurisdiction in the future over all interstate transmission by public utilities, including transmission used for "bundled"[4] retail electric sales, there is no need for the Court to review the issue now. However, should the Court grant States' petition then it should also grant Enron's petition to permit a complete assessment of the issues.

The opinion is reported at 225 F.3d 667, *amended*, 2000 U.S. App. LEXIS 15362 (D.C. Cir. Nov. 14, 2000).

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[1] TAPS is an informal association of municipal, cooperative and investor-owned utilities and other supporters in more than 29 states promoting open and non-discriminatory transmission access. Many TAPS members are entirely or predominantly transmission-dependent. States Pet. App. C-29. Unless otherwise noted or obvious all references herein are to States' Petition and Appendices.

[2] Contrary to Dalton's claim (Pet. 8), FERC based its order on a generic finding of *existing* undue discrimination in transmission services. *See* Enron Pet. App. D-192a, 213a, E-437a. Also, Dalton (Pet. 24) misreads *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), as barring FERC from ordering transmission service to cure undue discrimination, a matter not reached in the Court's decision.

[3] TAPS responds to questions 1, 2 and 4 of the States' Petition.

[4] In a bundled retail sale transmission and electric energy are provided and sold together under one rate, and in an unbundled sale they are provided and sold separately. Pet. App. Q-3.

REASONS WHY THE STATES' PETITION SHOULD BE DENIED

I. PETITIONERS' FIRST POINT RESTS UPON A PREMISE REJECTED BY THIS COURT AND CONTRARY TO THE RECORD BELOW, AND SEEKS REVIEW OF AN ALTERNATIVE (AND SOUND) HOLDING

Petitioners States challenge the decision below because it affirms FERC's regulation of transmission used for unbundled retail electric sales, arguing that this is an impermissible regulation of "the transmission of electricity from a generator to a retail customer in the same state ...." Pet. 10. Their objection rests upon the discredited premise that a modern electric system directly transmits electrons "from a generator to a retail customer." *Id.* This is not how an integrated and interconnected electric transmission system works. The precedent of this Court and the decision and order below correctly find that power on an integrated and interconnected electric system "comes from a variety of sources" and is "commingled just as molecules of water from different sources (rains, streams, etc.) [are] commingled in a reservoir." *FPC v. Florida Power & Light Co.*, 404 U.S. 453, 461 (1972). This commingled power is energy transmitted "in interstate commerce" within the meaning of the Federal Power Act ("FPA") and thus transmission subject to FERC's jurisdiction.

The FPA authorizes FERC to regulate "the transmission of electric energy in interstate commerce." FPA § 201(a), 16 U.S.C. § 824(a) (1994). Based upon this language, as construed by this Court, the D.C. Circuit affirmed FERC's jurisdiction over the transmission component of unbundled retail sales. The decision properly found this Court to have held that FERC had plenary jurisdiction over the

transmission by nearly[5] "every privately owned interconnected [utility] in the United States ...." Pet. App. C-33 (quoting *FP&L*, 404 U.S. at 471 [Douglas, J., dissenting]).[6] *FP&L* is consistent with FERC's expert determination below: transmission used to support unbundled retail sales, like all transmission, is transmission of a commingled stream of electrons from multiple, including interstate, sources.[7] "Because of the highly integrated nature of the electric system, ... most transmission of electric energy [is] 'in interstate commerce.'" Pet. App. D-90.

There is no support in the decision or orders below (or otherwise) for the States' contention that there is direct transmission of electricity from a generator to a retail customer in the same state. At best, the States' jurisdictional challenge rests upon a fictional "contract path for a particular power or transmission sale ...." Pet. App. D-90. But as the decision and order below correctly recognize, this Court has held that federal jurisdiction follows the "engineering and scientific" flow of electricity, not fiction. Pet. App. D-91; *see also* Pet. App. C-31–33 (same).

Contrary to States' fourth question (Pet. i), the D.C. Circuit did not improperly defer to FERC's interpretation of its

---

[5] There is intrastate transmission in Alaska, Hawaii and (arguably) portions of Texas because electric utility systems in these states are not interconnected (or interconnected only through direct current ties) with electric systems in other states. The States concede that FERC is not seeking to exercise jurisdiction over such transmission. Pet. 16 n.10. *See also* Pet. App. D-43 n. 541.

[6] The decision below strongly suggests that FERC could exercise jurisdiction over the transmission component of bundled retail electric sales, but as "a statutorily permissible policy choice" declined to do so. Pet. App. C-34.

[7] Contrary to States' assertion (Pet. 12), *FP&L* did involve federal preemption of state regulation. *FP&L* affirmed the Federal Power Commission's ("FPC") finding that Florida Power "must comply with all ... requirements of the Commission's Regulations under the [FPA]." *Florida Power & Light Co.*, 37 F.P.C. 544, 546 (1967), *aff'd*, 404 U.S. 453 (1972).

jurisdiction. As the States concede (Pet. 7), deference is an alternative holding reached only after the decision affirmed FERC's jurisdiction based on this Court's precedent construing the FPA. This alternative holding does not raise a question worthy of certiorari.

In any event, such deference is consistent with numerous decisions of this Court. *See, e.g., Massachusetts v. Morash*, 490 U.S. 107, 116-118 (1989); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380-81 (1988) (and cases cited therein). Seeking to rely upon *Hillsborough County v. Automated Medical Labs, Inc.*, 471 U.S. 707, 715 (1985), a decision not involving the FPA, the States argue that it is wrong to defer to FERC's interpretation of its jurisdiction because the FPA reserves certain powers to the states. However, in *MP&L*, decided subsequent to *Hillsborough*, Justice Scalia, writing in concurrence, explained that the *MP&L* Court did just that, *i.e.*, deferred to FERC's assertion of jurisdiction over purportedly state matters. *MP&L*, 487 U.S. at 380-81. Similarly, in *FP&L*, 404 U.S. at 463, the Court deferred to the FPC's "technical expertise and experience" in affirming federal jurisdiction over matters allegedly left to the states.

It is not clear there is a conflict between the decision below and *Northern States Power Co. v. FERC*, 176 F.3d 1090 (8th Cir. 1999), *cert. denied*, 120 S. Ct. 1221 (U.S. 2000). *NSP*, 176 F.3d at 1096, held only that FERC had "no jurisdiction ... over the state's regulation of NSP's bundled retail sales activities," based upon FERC's own jurisdictional "conce[ssion]." If States' reading of *NSP* were correct, that decision would be in conflict with the holding in *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 636 (1972), that under the Natural Gas Act the FPC has authority over all interstate gas transportation, including transportation of bundled retail sales.

II. THE STATES' SECOND POINT RESTS UPON THE INVALID PREMISE THAT THE STATES CAN REGULATE WHOLESALE ELECTRIC POWER SALES

The States' argument that Order 888 improperly extends FERC jurisdiction to facilities used in local distribution of electric energy (Pet. 19-21) is equally misconceived. FPA section 201(b)(1) grants FERC jurisdiction over "all facilities" used by public utilities for the interstate transmission or wholesale sale of electric energy. The provision goes on to state that "except as specifically provided in this subchapter and subchapter III of this chapter," *i.e.*, Parts II and III of the FPA, FERC lacks jurisdiction "over facilities used in local distribution." As the D.C. Circuit correctly found, the FPA subordinates state jurisdiction over local distribution facilities to FERC jurisdiction over interstate transmission and sales at wholesale. Pet. App. C-37. Far from being an expansion of FERC jurisdiction, Order 888 confirms jurisdiction FERC and the FPC have for decades exercised over delivery over low-voltage power delivery facilities of wholesale sales of electric energy.

The necessary and faulty premise of States' position is that the states can regulate aspects of wholesale sales transported on low voltage distribution systems. States' position is irreconcilable with *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 89 (1927), finding the states powerless to regulate wholesale electric sales, and an "unbroken chain" of wholesale (gas) transport. This unbroken wholesale delivery chain exists under the FPA and bars states from regulating the low voltage delivery component of wholesale sales. *See United States v. Pub. Utils. Comm'n*, 345 U.S. 295, 310-11, 316 (1953) (neither FPA § 201(a) nor the use of local distribution facilities in effecting a sale preserve State commission jurisdiction over sales for resale in interstate commerce). "FERC's assertion of jurisdiction over all wholesale transmissions, regardless of

the nature of the facility, is clearly within the scope of its statutory authority." Pet. App. C-37.

The States' reliance on *Connecticut Light & Power Co. v. FPC,* 324 U.S. 515 (1945) is misplaced because the Court did not find that the states could regulate the low voltage distribution component of wholesale sales by public utilities. *See Arkansas Power & Light Co. v. FPC*, 368 F.2d 376, 383 & n.8 (8th Cir. 1966). Contrary to States' claim (Pet. 20), *Wisconsin-Michigan Power Co. v. FPC*, 197 F.2d 472, 477 (7th Cir. 1952), held that low-voltage delivery facilities used to deliver wholesale transactions were not "local distribution facilities" exempt from FPC jurisdiction because "at no point before the delivery to [the wholesale customer] has been completed, [is] interstate transmission terminated." Also, contrary to States' petition (Pet. 20), the reasoning of *Duke Power Co. v. FPC,* 401 F.2d 930, 942 (D.C. Cir. 1968), is that Duke's low voltage facilities would have been FPC "jurisdictional facilities ... [if they were] engaged in the ... sale at wholesale of electric energy in interstate commerce," but they were not. *Id.* at 950.

CONCLUSION

For these reasons, the petitions for writ of certiorari of the States and Dalton should be denied.

Respectfully submitted,

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(3)

No. 00-800

IN THE

Supreme Court of the United States

BOARD OF WATER, LIGHT AND SINKING FUND COMMISSIONERS OF THE CITY OF DALTON, GEORGIA,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT ENRON POWER MARKETING, INC. IN OPPOSITION

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3000

QUESTIONS PRESENTED

1. Whether the findings of the Federal Energy Regulatory Commission (FERC) of pervasive present undue discrimination in the transmission of electric power were supported by substantial evidence.

2. Whether FERC had authority under Section 206 of the Federal Power Act to remedy the pervasive present undue discrimination it had found by ordering each transmission-owning utility to file an open access transmission tariff (OATT).

RULE 29.6 STATEMENT

Enron Corp. is the only publicly held company that owns 10% or more of respondent's stock. The following companies are the parent companies of respondent:

Enron Corp.

Enron North America Corp.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT 1

A. Statutory Background 2

B. Regulatory Background 3

C. Proceedings in the D.C. Circuit 6

ARGUMENT 7

I. THE QUESTION WHETHER FERC HAD SUFFICIENT EVIDENCE TO SUPPORT ITS FINDINGS OF ACTUAL PRESENT UNDUE DISCRIMINATION DOES NOT WARRANT THIS COURT'S REVIEW 7

II. FERC'S AUTHORITY UNDER SECTION 206(a) TO REMEDY UNDUE DISCRIMINATION BY ORDERING OPEN ACCESS IS CLEAR AND DOES NOT MERIT THIS COURT'S REVIEW 12

CONCLUSION 18

APPENDIX A: Statutory Provision — 16 U.S.C. § 824a 1a

TABLE OF AUTHORITIES

CASES

Page(s)

Anaheim, Riverside, Banning, Colton, & Azusa, California v. FERC, 669 F.2d 799 (D.C. Cir. 1981) 10
Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 13
Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987) ..... *passim*
Bloomer Shippers Association v. Interstate Commerce Commission, 679 F.2d 668 (7th Cir. 1982) 10
Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 11
Ex Parte Collett, 337 U.S. 55 (1949) 14
Louisiana Public Service Commission v. FERC, 174 F.3d 218 (D.C. Cir. 1999) 10
NLRB v. Fremont Manufacturing Co., 558 F.2d 889 (8th Cir. 1977) 10
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 7, 15, 16
Transmission Access Policy Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000) ..... *passim*
Wisconsin Gas Co. v. FERC, 770 F.2d 1144 (D.C. Cir. 1985) 11, 13

STATUTES

Federal Power Act
16 U.S.C. § 824a 16
16 U.S.C. § 824d(b) 2
16 U.S.C. § 824e(a) 2, 3, 12
16 U.S.C. § 824k(e) 17

TABLE OF AUTHORITIES — Continued

Page(s)

Natural Gas Act, 15 U.S.C. § 717d 13
Public Utility Act of 1935, Pub. L. No. 74-333, 49 Stat. 803 15
Natural Gas Act, Pub. L. No. 75-688, 52 Stat. 821 (1938) 15

ADMINISTRATIVE MATERIALS

Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Transmitting Utilities, Order No. 888, [1991-96 Reg. Preambles] F.E.R.C. Stats. & Regs. ¶31,036 (1996) ..... *passim*

Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888-A, [Reg. Preambles] III F.E.R.C. Stats. & Regs. ¶31,048 (1997) ..... *passim*

Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Notice of Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking, [1988-1998 Proposed Regs.] F.E.R.C. Stats. & Regs. ¶32,514 (1995) 8, 9

IN THE

Supreme Court of the United States

No. 00-800

BOARD OF WATER, LIGHT AND SINKING FUND COMMISSIONERS OF THE CITY OF DALTON, GEORGIA,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT ENRON POWER MARKETING, INC. IN OPPOSITION

Enron Power Marketing, Inc. (Enron) respectfully opposes the petition of the Board of Water, Light and Sinking Fund Commissioners of The City of Dalton, Georgia (Dalton), seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

STATEMENT

In Order Nos. 888 and 888-A, the Federal Energy Regulatory Commission (a) found that electric utilities that own electric transmission facilities are engaged in pervasive undue discrimination in favor of their own uses and against competing users, including competing suppliers of electricity; (b) partially remedied that undue discrimination

by ordering such utilities to file "open access transmission tariffs" (OATTs) and requiring the utilities to take transmission service for their own *wholesale* sales and *un*bundled retail sales on the same terms applicable to all other users; but (c) declined on jurisdictional grounds to apply this requirement to a utility's transmission services for which the charge is "bundled" by the utility into its retail charge for electricity. The D.C. Circuit generally upheld FERC's Orders.

The Dalton petition is one of three seeking review of the D.C. Circuit's decision. In No. 00-568, the State of New York and others contend that FERC's orders exceeded its jurisdiction. In No. 00-809, Enron seeks review on the opposite ground: that FERC understated its jurisdiction and hence failed to respond to transmission-owning utilities' discrimination in favor of their own bundled retail sales, a serious nationwide problem that FERC had found and was obligated to cure. In No. 00-800, Dalton presents questions that boil down to an extended argument that FERC did not have sufficient evidence to support its findings of undue discrimination; Enron opposes this petition because the evidentiary issues it poses do not merit this Court's review.

A. Statutory Background

Section 205(b) of the Federal Power Act (FPA), 16 U.S.C. § 824d(b),[1] bars any public utility from "grant[ing] any undue preference or advantage to any person or subject[ing] any person to any undue prejudice or disadvantage." When FERC finds such undue discrimination, Section 206(a) of the Act, 16 U.S.C. § 824e(a), commands FERC to provide a remedy. If FERC determines that a practice is "unjust, unreasonable, unduly discriminatory or preferential," FERC must cure the

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[1] All statutory provisions cited in this brief are set out in No. 00-809 Pet. App. 645a-681a, except for 16 U.S.C. § 824a, which is set out in the appendix to this opposition.

discrimination by "determin[ing] the just and reasonable rate, charge, classification, rule, regulation, [or] practice . . . to be thereafter observed and in force, and shall fix the same by order." *Id.* In the present instance, the remedy FERC imposed was (partial) open and nondiscriminatory access to a utility's transmission facilities. No provision of the Act limits FERC's power to order open and nondiscriminatory access as a Section 206(a) remedy for undue discrimination.

B. Regulatory Background

The businesses of generating, transmitting, and selling electric energy are undergoing major structural change. Historically, electricity was provided to almost all users by vertically-integrated regulated-monopoly local utilities, which performed or contracted for all three functions (generation, transmission, and distribution) and sold delivered electricity to each user for a single bundled charge. Today, in large part because Congress adopted measures to encourage competition among energy producers, *see* No. 00-809 Pet. App. 147a-156a, electric energy is generated and marketed by a multitude of competing firms, including the traditional monopoly utilities competing in other markets.

Important segments of the transmission grid, however, continue to be owned by the monopoly local utilities. In Order Nos. 888 and 888-A, FERC concluded that these utilities have an inherent incentive to discriminate, and have been and are discriminating, against competing suppliers that are dependent on the utilities for transmission services. *See* No. 00-809 Pet. App. 214a-216a, 315a-331a. To remedy this undue discrimination (in part), FERC required each such utility to adopt a pro forma OATT and to take transmission service for its own wholesale and unbundled retail sales under the OATT pursuant to the same terms and conditions it offers to other users. No. 00-809 Pet. App. 178a.

These remedial orders were a direct response to fundamental changes in the industry, particularly the

emergence and growth of independent generators and marketers of electric power that compete with the traditional local-monopoly utilities. This new competition came about because of both legal and technological changes. In response to the energy crisis of the 1970s, Congress enacted the Public Utility Regulatory Policies Act of 1978, and later the Energy Policy Act of 1992, which encouraged competition with the established utilities by creating incentives for the construction of new generation facilities. *See* No. 00-809 Pet. App. 152a-157a. Over the same period, technical advances permitted transmission of electric power over longer distances without excessive losses. *See* No. 00-809 Pet. App. 9a-10a. These factors, together with the creation of a large interstate transmission grid, so altered the industry that "[i]n 1992, for the first time, generating capacity added by independent producers exceeded capacity added by utilities." No. 00-809 Pet. App. 151a (alteration in original) (internal quotations and citation omitted).

New competitive generation activities, however, faced a "serious obstacle." No. 00-809 Pet. App. 10a. In many areas, the traditional local-monopoly utilities continue to own the only regional facilities available for transmission of electric energy. The nascent competition from independent energy suppliers was threatened by the anticompetitive practices of these utilities. As FERC found, these utilities have exercised their monopoly power by discriminating against competing sources of power, hindering the new generation and marketing companies from transmitting their electric power on competitive terms.

In Order No. 888, FERC made extensive findings of both existing and potential future undue discrimination by utilities against competing electric energy producers. The Order's findings of present and potential future discrimination were straightforward and unqualified. FERC prefaced Order No. 888 by stating, "[i]n this rule, the Commission seeks to remedy both existing and future undue

discrimination in the industry." No. 00-809 Pet. App. 133a. FERC went on to find "more than sufficient reason to believe that transmission monopolists currently engage in unduly discriminatory practices, and that they will continue to engage in unduly discriminatory practices, unless we fashion a remedy to eliminate their ability and incentive to do so." No. 00-809 Pet. App. 216a-217a. FERC noted that this discrimination takes the form of both outright refusals to transmit the power generated by competitors and more subtle forms of discrimination, including imposing terms of transmission less favorable than those enjoyed by the transmission-owning utilities themselves. *See, e.g.*, No. 00-809 Pet. App. 213a-217a.

FERC's findings of undue discrimination included a comprehensive account of the systemic problems and anti-competitive incentives that had already caused transmission owners to discriminate unduly. *See* No. 00-809 Pet. App. 213a ("We conclude that unduly discriminatory and anticompetitive practices exist today in the electric industry and, more importantly, that such practices will increase as competitive pressures continue to grow . . . ."). Order No. 888-A explained that "[t]he inherent characteristics of monopolists make it inevitable that they will act in their own self-interest to the detriment of others by refusing transmission and/or providing inferior transmission to competitors . . . to favor their own generation . . . ." No. 00-809 Pet. App. 436a (internal quotations and citation omitted).

FERC's findings of undue discrimination also "rel[ied] in part on the array of allegations and circumstances raised by customers in individual cases over the years and brought forth in response to the [Notice of Proposed Rulemaking]." No. 00-809 Pet. App. 435a. Detailed examples of specific instances of claimed undue discrimination were described in Appendix C to Order No. 888. *See* No. 00-809 Pet. App. 315a-331a. These examples included accounts of "refusals

to wheel,[2] dilatory tactics that so protracted negotiations as to effectively deny wheeling, refusals to provide service priority equal to native load, or refusals to provide service flexibility equivalent to the utility's own use." No. 00-809 Pet. App. 316a.

FERC's partial remedy for this undue discrimination was to order "open access," requiring every public utility to transmit the electric energy of other firms, including its power-producing competitors, "under the same tariff of general applicability" as applied to the wholesale and unbundled retail transmission of the utility's own electric energy. No. 00-809 Pet. App. 178a. FERC explained its decision to order such open access saying, "The only way to effectuate competitive markets and remedy discrimination is through readily available, nondiscriminatory transmission access." No. 00-809 Pet. App. 382.

C. Proceedings in the D.C. Circuit

The D.C. Circuit upheld FERC's orders against a variety of challenges. One of these came from Dalton and others, which alleged that FERC had not made the necessary findings of undue discrimination to support its orders, and that the open access remedy exceeded FERC's statutory authority.

The D.C. Circuit held that FERC's findings of "a fundamental systemic problem in the industry," No. 00-809 Pet. App. 13a-14a, and "systemic monopoly conditions and the resulting potential for anti-competitive behavior," No. 00-809 Pet. App. 22a, were reasonable, and constituted sufficient basis for FERC's actions under Section 206, *see* No. 00-809 Pet. App. 21a-24a. The court also expressly rejected Dalton's argument that before acting under Section

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[2] "Wheeling" is a term of art describing the practice of transmitting one producer's energy over the transmission lines of another. *See Associated Gas Distribs. v. FERC*, 824 F.2d 981, 998 (D.C. Cir. 1987).

206(a) FERC was required to find that particular utilities had engaged in specific acts of undue discrimination. No. 00-809 Pet. App. 22a-23a.

The D.C. Circuit went on to reject Dalton's arguments that FERC lacked authority to order open access as a remedy for undue discrimination. The court held that its decision was controlled by *Associated Gas Distributors v. FERC*, 824 F.2d 981, 998 (D.C. Cir. 1987) (*AGD*), which upheld a parallel open access requirement that FERC had imposed on the transportation of natural gas, pursuant to language in the Natural Gas Act (NGA) materially identical to Section 206 of the FPA. No. 00-809 Pet. App. 19a-21a. The Court rejected as inapplicable the precedent chiefly relied upon by petitioners, *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), because that case did not consider the scope of FERC's authority to order open access as a remedy under Section 206(a) of the FPA for undue discrimination.

ARGUMENT

Dalton seeks review of one evidentiary question and one phantom issue. Dalton's first argument amounts to a claim that FERC's findings of undue discrimination were based on insufficient evidence. Dalton's second argument ignores FERC's findings of actual present undue discrimination and rests on a decision (*Otter Tail*) that does not address FERC's power to remedy such discrimination. Neither issue warrants this Court's review.

I. THE QUESTION WHETHER FERC HAD SUFFICIENT EVIDENCE TO SUPPORT ITS FINDINGS OF ACTUAL PRESENT UNDUE DISCRIMINATION DOES NOT WARRANT THIS COURT'S REVIEW.

Although framed as a question of statutory construction, Dalton's first Question Presented actually asks the Court to review the evidence supporting FERC's findings of undue

discrimination. Dalton's question asks whether the finding of conditions creating a "*potential* for anticompetitive behavior" (Dalton Pet. at 14 (emphasis added)) is statutorily sufficient for FERC to impose a remedy under Section 206. But FERC did not find mere "potential" future undue discrimination. FERC found actual present undue discrimination. The findings were based in part on structural conditions in the industry, and on inferences FERC drew from these conditions, but the findings were also based on widespread accounts of specific instances of undue discrimination. These are both appropriate bases for empirical findings supporting a rulemaking, and the D.C. Circuit's affirmance of the findings presents no certworthy issue.

FERC expressly found actual, not merely potential, undue discrimination by the owners of transmission facilities. FERC stated that the very purpose of Order No. 888 was "to remedy both *existing* and future undue discrimination." No. 00-809 Pet. App. 133a (emphasis added). FERC stated that "unduly discriminatory and anticompetitive practices exist *today* in the electric industry." No. 00-809 Pet. App. 213a (emphasis added). FERC had found that "[i]n the past, transmission-owning utilities have discriminated against others seeking transmission access," No. 00-809 Pet. App. 614a, and FERC said that it expected "the same type of discriminatory and anticompetitive behavior [to] continue," if left unremedied, No. 00-809 Pet. App. 622a.

Dalton contends that in Order No. 888-A FERC jettisoned this finding: "[FERC] abandoned its claim that evidence of record supported a finding of existing undue discrimination." (Dalton Pet. at 8.) But Dalton is simply wrong: Order No. 888-A left substantially intact the factual findings FERC set out in Order No. 888. For example, Order No. 888-A emphasized that "[t]he record supports our conclusion that, absent open access, undue discrimination will *continue* to be a fact of life in *today's* and tomorrow's

electric power markets," No. 00-809 Pet. App. 382a (emphasis added), and went on to state that "the vast majority of utilities historically have declined to transport electric energy that would compete with their own sales or have offered access that is inferior to what they use for their own sales," No. 00-809 Pet. App. 436a-437a.

FERC's findings of actual present undue discrimination were based on two kinds of evidence: structural conditions in the industry and accounts of specific instances of undue discrimination. Both properly support the findings.

With respect to structural conditions, the D.C. Circuit described FERC's findings as follows:

> The Commission found that "utilities owning or controlling transmission facilities possess substantial market power, that, as profit maximizing firms, they have and will continue to exercise that market power in order to maintain and increase market share, and will thus deny their wholesale customers access to competitively priced electric generation; and that these unduly discriminatory practices will deny consumers the substantial benefits of lower electricity prices."

No. 00-809 Pet. App. 11a (quoting Notice of Proposed Rulemaking, [1988-1998 Proposed Regs.] F.E.R.C. Stats & Regs. ¶32,514, at 33,032 (1995) (No. 00-809 Pet. App. 566a)). FERC said that structural conditions in the industry "make it inevitable that [the transmission-owning utilities] will act in their own self-interest to the detriment of others by refusing transmission and/or providing inferior transmission to competitors." No. 00-809 Pet. App. 214a, 436a (internal quotation omitted). FERC found a "fundamental systemic problem in the industry," No. 00-809 Pet. App. 13a-14a: where monopoly transmission facilities are owned by an electricity supplier in active competition with other suppliers that must use the same facilities, the owner will inevitably

tend to discriminate against its competitors to maximize its own profit. FERC found that this incentive had caused utilities to refuse to offer transmission services to their competitors on equal terms. *See* No. 00-809 Pet. App. 213a-215a, 435a-437a. These findings, although based in part on inferences from the industry's structure, were not conjecture; they were findings of actual present undue discrimination based on structural facts and elementary economics.

As the D.C. Circuit noted, *see* No. 00-809 Pet. App. 22a-23a, it has repeatedly ruled that an agency is entitled to make reasonable factual determinations based on structural inferences. *See AGD*, 824 F.2d at 1008-09 (upholding FERC inferences based on the general incentives at work in the natural gas transportation industry). In fact, the D.C. Circuit has emphasized that "inference[s] from all the circumstances are the stuff of which substantial evidence is made." *Louisiana Pub. Serv. Comm'n v. FERC*, 174 F.3d 218, 227 (D.C. Cir. 1999) (alteration in original) (internal quotations and citation omitted); *see also Anaheim, Riverside, Banning, Colton, & Azusa, California v. FERC*, 669 F.2d 799, 802 (D.C. Cir. 1981) (upholding FERC findings that were "reasoned inferences from substantial evidence"); *Bloomer Shippers Ass'n v. Interstate Commerce Comm'n*, 679 F.2d 668, 672 (7th Cir. 1982) (refusing to evaluate the weight of the evidence because "the weighing of the evidence and the drawing of inferences and conclusions from it" are the functions of the agency alone) (citations omitted); *NLRB v. Fremont Mfg. Co.*, 558 F.2d 889, 890-91 (8th Cir. 1977) ("In analyzing the evidence, whether circumstantial or direct, the Board is free to draw reasonable inferences.") (citation omitted).

FERC also relied on "the array of allegations and circumstances raised by customers in individual cases over the years and brought forth in response to the [Notice of Proposed Rulemaking]." No. 00-809 Pet. App. 455a. Appendix C to Order No. 888 recounts reports of undue

discrimination including refusals to wheel, dilatory tactics amounting to refusals to wheel, and refusals to offer comparable service. No. 00-809 Pet. App. 315a-331a. Dalton suggests that these accounts are not a valid foundation for FERC's findings because they do not amount to individualized determinations of undue discrimination by particular utilities.[3] (*See* Dalton Pet. at 21.) But rulemaking can be based on "comments from customers" on which it is reasonable for the agency to rely. *Wisconsin Gas Co. v. FERC*, 770 F.2d 1144, 1158 (D.C. Cir. 1985). FERC was not required to make case-by-case findings with respect to all, or any, individual firms. No. 00-809 Pet. App. 23a ("the agency is . . . not required to make 'specific findings,' so long as the agency's factual determinations are reasonable") (citation omitted); *see also AGD*, 824 F.2d at 1008-09 (upholding FERC's open access rule under the Natural Gas Act against claims of failure to make pipeline-specific factual findings, on the grounds that "[t]he Commission is not required to make individual findings . . . if it exercises its § 5 authority by means of a generic rule.") (citation omitted); *Wisconsin Gas*, 770 F.2d at 1165-68. As the D.C. Circuit held, FERC's reliance on credible reports of specific instances of actual undue discrimination is also a legitimate basis for FERC's factual findings. *See* No. 00-809 Pet. App. 22a-23a.

Finally, Dalton's argument that the D.C. Circuit misapplied *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), on this point is based

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[3] Dalton contends that its unique common-ownership situation demonstrates that it has not discriminated unduly (*see* Dalton Pet. at 16-18) and alleges that FERC should have "afforded [it] a reasonable opportunity to respond" to allegations that it was responsible for undue discrimination. (Dalton Pet. at 21). But Dalton was afforded a full opportunity to respond to claims of undue discrimination throughout the rulemaking. Moreover, if Dalton believes that open access is not appropriate in its particular case, it is free to petition FERC for redress under Section 206. *See* No. 00-809 Pet. App. 24a.

on a false premise. Dalton asserts (Dalton Pet. at 7) that FERC erroneously interpreted Section 206 to allow it to base its orders on merely potential future undue discrimination. Dalton then argues that this interpretation was not entitled to deference because it is contrary to the plain meaning of the statute. But FERC made no such interpretation; and the court of appeals engaged in no such deference. FERC found actual present undue discrimination, and the court of appeals determined that FERC had an adequate basis for that finding. It accepted FERC's findings without any reliance on *Chevron*. There is no broader issue that requires this Court's review.[4]

II. FERC'S AUTHORITY UNDER SECTION 206(a) TO REMEDY UNDUE DISCRIMINATION BY ORDERING OPEN ACCESS IS CLEAR AND DOES NOT MERIT THIS COURT'S REVIEW.

Dalton's second Question Presented starts from a false premise. The issue before the D.C. Circuit was not, as Dalton suggests, whether FERC had general statutory power to require open access as being in the public interest. The issue was whether open access is a permissible remedy under Section 206(a) for the actual present discrimination that FERC found. Dalton's argument that FERC lacks general statutory power under other sections of the Act to order open access is an attack on a straw man.

Section 206(a) commands FERC, after a finding of undue discrimination, to cure such discrimination by ordering the "just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force." 16 U.S.C. § 824e(a). The language

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[4] The D.C. Circuit does discuss *Chevron* in the section of its opinion dealing with the power of FERC to order wheeling as a remedy for undue discrimination. *See* No. 00-809 Pet. App. 20a-21a. *Chevron* is never mentioned, however, in the section that discusses the sufficiency of the evidence of undue discrimination. *See* No. 00-809 Pet. App. 21a-24a.

is broad; it contains no pertinent limitation on FERC's authority to order open access.[5]

On the contrary, FERC has clear authority, established under the parallel provision of the NGA, to order open access as a remedy under Section 206. At issue in *AGD* was FERC's Order No. 436, requiring natural gas pipelines to provide open access as a remedy for undue discrimination in the transportation of natural gas.[6] A group of pipelines petitioned the D.C. Circuit for review, arguing that because Congress had not adopted proposals to convert the gas pipelines into common carriers, and had not otherwise granted FERC the affirmative authority to order open access, FERC could not order open access as a remedy for undue discrimination under Section 5 of the NGA, 15 U.S.C. § 717d. The D.C. Circuit rejected this argument and upheld FERC's order requiring open access. The court's decision was based on the breadth of Section 5's affirmative directive to "stamp out" undue discrimination, *AGD*, 824 F.2d at 998, and the fact that there was "no language in the NGA barring the Commission from imposing common carrier status on natural gas pipelines," *id.* at 997. The court said the

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[5] FERC's industry-wide OATT is a well-tailored start toward meeting FERC's obligations under Section 206 in light of the systemic and "inevitable," No. 00-809 Pet. App. 436a (quoting No. 00-809 Pet. App. 214a), undue discrimination FERC found. Dalton suggests (*see* Dalton Pet. at 21) that FERC was required to make findings of undue discrimination by each utility subject to FERC's orders. But as Dalton also acknowledges (*see id.*), FERC had the authority to proceed by rulemaking to solve an actual and specific, but pervasive, problem. *See* No. 00-809 Pet. App. 22a-23a; *AGD*, 824 F.2d at 1008-09; *Wisconsin Gas*, 770 F.2d at 1158.

[6] All provisions of Part II of the FPA pertinent to this case are "in all material respects substantially identical" to parallel provisions of the NGA. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (internal quotations omitted). This Court has an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Id.*

pipelines' argument "turn[ed] statutory construction upside down, letting the failure to grant a general power prevail over the affirmative grant of a specific one." *Id.* at 998.

Dalton argues that *AGD* does not control this FPA case because, although the pertinent statutory provisions are the same in all material respects, the legislative histories of the NGA and FPA differ with respect to the open access issue. Specifically, the legislative history of the FPA suggests that Congress considered and rejected a provision that would have empowered FERC's predecessor to "order wheeling if it found such action to be 'necessary or desirable in the public interest,'" *id.* (citation omitted), while the legislative history of the NGA "consists exclusively of various occasions on which Congress did not adopt proposals actually making the natural gas pipelines into common carriers," *id.* at 998-99.

But the best indication of congressional intent is, as always, the words of the statute; when Congress deliberately uses the same words in two different statutes, the compelling inference is that it meant the same thing in both.[7] Dalton argues that the *AGD* court, interpreting the NGA, rejected reliance on the FPA's legislative history because the histories of the two statutes differ as described. But the fact that that court found it easy, in construing the NGA, to reject any reliance on the legislative history of the FPA, a different statute, hardly suggests that the parallel language of the two statutes should be read differently now. The *AGD* court's ruling did not turn on the legislative history of either statute, but on the fact that Section 5 of the NGA provided FERC with the power to order open access to remedy undue

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[7] *See, e.g., Ex Parte Collett*, 337 U.S. 55, 61 (1949) ("no need to refer to the legislative history where the statutory language is clear"); *see also AGD*, 824 F.2d at 997 ("courts have no authority to enforce principles gleaned solely from legislative history that has no statutory reference point.") (internal quotations and citations omitted).

discrimination. *See AGD*, 824 F.2d at 998-1000. The FPA's parallel language compels the same result here.

The difference in legislative histories on this point is in any event not significant. As FERC noted in Order No. 888, the most natural explanation of the shorter legislative history on this point in the NGA context is sequence: "Congress had just debated the common carrier issue in enacting electric power regulation [and therefore] it is not surprising that Congress did not engage in debating the very same issue in enacting natural gas regulation" a mere three years later. No. 00-809 Pet. App. 204a.[8] In short, Dalton's resort to legislative history to argue that two parallel statutory provisions—Section 206 of the FPA and Section 5 of the NGA—should be interpreted differently fails when those histories are viewed in context. In any event, the legislative history cited does not support any limitation on FERC's ability to order open access as a remedy for undue discrimination.

Dalton also invokes *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), in which this Court affirmed the order of a district court requiring wheeling of electric power as a remedy for a violation of the federal antitrust laws. In the course of deciding that case, the Court considered whether the antitrust laws, insofar as they had applied to the electric power industry, had been "[r]epeal[ed] . . . by implication" by the FPA. *Id.* at 372 (internal quotations and citation omitted). The Court held that there was no repeal by implication because the FPA nowhere specifically empowered FERC to order wheeling as a general regulatory measure. The Court's conclusion rested on its analysis of Section 202(b) of the FPA, which empowers FERC to order utilities to connect their transmission facilities to the facilities

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[8] Section 206 was enacted as part of the Public Utility Act of 1935, Pub. L. No. 74-333, 49 Stat. 803. The Natural Gas Act, Pub. L. No. 75-688, 52 Stat. 821 (1938), was enacted less than three years later.

of others involved in the generation or sale of electricity when such connection is "necessary or appropriate in the public interest." 16 U.S.C. § 824a. The Court's conclusion was that this section does not empower the Commission to order wheeling merely because the Commission finds it "in the public interest."

Dalton argues that because, under the analysis in *Otter Tail*, FERC lacks authority under Section 202(b) to order wheeling when "necessary or appropriate in the public interest," FERC must also lack authority to open access under Section 206 upon a finding of undue discrimination. The D.C. Circuit correctly rejected this *non sequitur* on the straightforward ground that *Otter Tail* has no bearing on the present case. This case does not ask whether FERC has general power to order wheeling whenever it believes desirable. Conversely, *Otter Tail* did not address the scope of FERC's powers to remedy undue discrimination and nowhere even mentioned Section 206.[9] Contrary to Dalton's implication, *Otter Tail* does not confine the measures available to FERC to correct undue discrimination to those made available to FERC elsewhere in the FPA. That implication is negated not only by the scope of *Otter Tail*'s holding, but also by the broad language of Section 206 itself.

Dalton's petition adds another argument based on *Otter Tail* that was not discussed by the court below: *Otter Tail*'s comment that the FPA aimed to preserve "the voluntary action of the utilities" precludes FERC from ordering involuntary open access. (*See* Dalton Pet. at 11 (quoting *Otter Tail*, 410 U.S. at 374).) The "voluntary action" discussed in *Otter Tail*, however, is clearly something

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[9] FERC noted in Order No. 888, "It would be far reaching indeed to conclude that *Otter Tail*, which was a civil antitrust suit that raised issues entirely unrelated to [FERC's] authority under section 206, is an impediment to [FERC] achieving one of the primary goals of the FPA—eradicating undue discrimination in transmission . . . ." No. 00-809 Pet. App. 185a.

different from the transmission-owning utilities' undue discrimination against their competitors, discrimination that Section 206 commands FERC to remedy.

Finally, Dalton argues (*see* Dalton Pet. at 26) that the revision of Section 211 of the FPA in 1992 to grant FERC authority to order wheeling on a case-by-case basis upon application by an electric utility implies that Congress did not intend to permit FERC to order open access as a Section 206 remedy for undue discrimination. This argument by negative implication must also fail. No provision of the FPA, including Section 211, limits FERC's ability to order open access as a remedy under Section 206. Because Section 211 was adopted after FERC Order No. 436 and the well-publicized decision in *AGD*, the natural inference is that Congress understood that FERC had broad power under both statutes to remedy undue discrimination by ordering open access—and did not wish to alter or limit that power. Indeed, Section 212(e) of the FPA, also added in 1992, is a savings provision stating, "Except as provided in section [210, 211, 212, or 214] of this title, such sections shall not be construed as limiting or impairing any authority of the Commission under any other provision of law." 16 U.S.C. § 824k(e). Section 211 contains no such limitation on or impairment of FERC's Section 206 remedial powers.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 26, 2000

APPENDIX A

STATUTORY PROVISION

[16 U.S.C. § 824a]

(a) Regional districts; establishment; notice to State commissions

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnection and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

(b) Sale or exchange of energy; establishing physical connections

Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to

each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: Provided, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

(c) Temporary connection and exchange of facilities during emergency

During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by

supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party.

(d) Temporary connection during emergency by persons without jurisdiction of Commission

During the continuance of any emergency requiring immediate action, any person engaged in the transmission or sale of electric energy and not otherwise subject to the jurisdiction of the Commission may make such temporary connections with any public utility subject to the jurisdiction of the Commission or may construct such temporary facilities for the transmission of electric energy in interstate commerce as may be necessary or appropriate to meet such emergency, and shall not become subject to the jurisdiction of the Commission by reason of such temporary connection or temporary construction: Provided, That such temporary connection shall be discontinued or such temporary construction removed or otherwise disposed of upon the termination of such emergency: Provided further, That upon approval of the Commission permanent connections for emergency use only may be made hereunder.

(e) Transmission of electric energy to foreign country

After six months from August 26, 1935, no person shall transmit any electric energy from the United States to a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application unless, after opportunity for hearing, it finds that the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may by its order grant such application in whole or in part, with such modifications and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time,

after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate.

(f) Transmission or sale at wholesale of electric energy; regulation

The ownership or operation of facilities for the transmission or sale at wholesale of electric energy which is (a) generated within a State and transmitted from the State across an international boundary and not thereafter transmitted into any other State, or (b) generated in a foreign country and transmitted across an international boundary into a State and not thereafter transmitted into any other State, shall not make a person a public utility subject to regulation as such under other provisions of this subchapter. The State within which any such facilities are located may regulate any such transaction insofar as such State regulation does not conflict with the exercise of the Commission's powers under or relating to subsection (e) of this section.

(g) Continuance of service

In order to insure continuity of service to customers of public utilities, the Commission shall require, by rule, each public utility to—

(1) report promptly to the Commission and any appropriate State regulatory authorities any anticipated shortage of electric energy or capacity which would affect such utility's capability of serving its wholesale customers,

(2) submit to the Commission, and to any appropriate State regulatory authority, and periodically revise, contingency plans respecting—

(A) shortages of electric energy or capacity, and

(B) circumstances which may result in such shortages, and

(3) accommodate any such shortages or circumstances in a manner which shall—

(A) give due consideration to the public health, safety, and welfare, and

(B) provide that all persons served directly or indirectly by such public utility will be treated, without undue prejudice or disadvantage.

Supreme Court, U.S.
FILED
JAN 26 2001
OFFICE OF THE CLERK

Nos. 00-568, 00-800 and 00-809

In the Supreme Court of the United States

STATE OF NEW YORK, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

BOARD OF WATER, LIGHT AND SINKING FUND COMMISSIONERS OF THE CITY OF DALTON, GEORGIA, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ENRON POWER MARKETING, INC., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

In its Order No. 888 rulemaking, the Federal Energy Regulatory Commission found that public utilities subject to its jurisdiction under the Federal Power Act (FPA), 16 U.S.C. 792 *et seq.*, discriminated unlawfully in providing access to their electric transmission facilities. As a remedy, Order No. 888 requires them to unbundle their packaged wholesale electric energy service into separate energy sales and transmission services and to provide non-discriminatory access to their electric transmission systems in order to ensure "open access" to the interstate energy transmission grid and thereby facilitate competition in the national market for electric energy. The questions presented are:

1. Whether the Commission's open access regulations are permissible under Sections 205 and 206 of the FPA, 16 U.S.C. 824d and 824e.

2. Whether the Commission properly concluded that Section 201 of the FPA, 16 U.S.C. 824, authorizes the Commission to assert jurisdiction over interstate transmission service involved in a retail sale transaction where States have unbundled such transactions into separate transmission and sales services, but does not require the Commission to assert jurisdiction over transmission service that remains bundled with local retail sales and distribution service.

3. Whether Section 201 of the FPA authorizes the Commission to assert jurisdiction over facilities that may be used both for local distribution to retail customers and for transmission of electric energy to wholesale purchasers.

4. Whether Section 201 of the FPA bars the Commission from allowing utilities to recover certain stranded costs caused by the unbundling of retail electric service.

TABLE OF CONTENTS

	Page
Opinions below	2
Jurisdiction	2
Statement	2
Argument	10
Conclusion	23

TABLE OF AUTHORITIES

Cases:

American Trucking Ass'ns v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397 (1967)	14
Arkansas Elec. Coop. Corp. v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983)	16
Associated Gas Distribs. v. *FERC*, 824 F.2d 981 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988)	8, 11, 12
CFTC v. *Schor*, 478 U.S. 833 (1986)	14
Connecticut Light & Power Co. v. *FPC*, 324 U.S. 515 (1945)	16, 17
EEOC v. *Commercial Office Prods. Co.*, 486 U.S. 107 (1988)	13
FDA v. *Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000)	14
FPC v. *Florida Power & Light Co.*, 404 U.S. 453 (1972)	8, 13
FPC v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972)	21
FPC v. *Southern Cal. Edison Co.*, 376 U.S. 205 (1964)	15, 16
Mississippi Power & Light Co. v. *Moore*, 487 U.S. 354 (1988)	14
Mississippi River Transmission Corp. v. *FERC*, 969 F.2d 1215 (D.C. Cir. 1992)	21

Cases—Continued: Page

Motor Vehicle Mfrs. Ass'n of United States v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) 14
NLRB v. *United Food & Commercial Workers Union*, 484 U.S. 112 (1987) 14
Northern States Power Co. v. *FERC*, 176 F.3d 1090 (8th Cir. 1999), cert. denied, 120 S. Ct. 1221 (2000) 15
Otter Tail Power Co. v. *United States*, 410 U.S. 366 (1973) 11
Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 10, 14
Reiter v. *Cooper*, 507 U.S. 258 (1993) 13

Statutes:

Federal Power Act, 16 U.S.C. 792 *et seq.*:
Pt. II, 16 U.S.C. 824-824m 2
§ 201, 16 U.S.C. 824 ..... 6, 13, 14, 15, 20
§ 201(a), 16 U.S.C. 824(a) 17
§ 201(b), 16 U.S.C. 824(b) 9, 12, 15, 17, 20, 21
§ 201(b)(1), 16 U.S.C. 824(b)(1) 2, 3, 17
§ 201(c), 16 U.S.C. 824(c) 3, 13
§ 201(e), 16 U.S.C. 824(e) 2
§ 201(f), 16 U.S.C. 824(f) 2
§ 205, 16 U.S.C. 824d 4, 8, 12
§ 205(b), 16 U.S.C. 824d(b) 3
§ 205(c), 16 U.S.C. 824d(c) 3
§ 206, 16 U.S.C. 824e 3, 4, 8, 12
§ 206(a), 16 U.S.C. 824e(a) 10
§ 211, 16 U.S.C. 824j 12, 15
§ 212(e)(1), 16 U.S.C. 824k(e)(1) 12
§ 212(h), 16 U.S.C. 824k(h) 14, 15, 18
Natural Gas Act, 15 U.S.C. 717 *et seq.*:
§ 1(b), 15 U.S.C. 717(b) 21
§ 5(a), 15 U.S.C. 717d(a) 11

Statutes—Continued:

	Page
§ 7(c), 15 U.S.C. 717f(c)	21
42 U.S.C. 7173(c)	11

In the Supreme Court of the United States

No. 00-568

STATE OF NEW YORK, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

No. 00-800

BOARD OF WATER, LIGHT AND SINKING FUND COMMISSIONERS OF THE CITY OF DALTON, GEORGIA, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

No. 00-809

ENRON POWER MARKETING, INC., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C121)[1] is reported at 225 F.3d 667. The relevant orders of the Federal Energy Regulatory Commission are reported as follows: Order No. 888, F.E.R.C. Stats. & Regs., Regulations Preambles January 1991-June 1996, ¶ 31,036; Order No. 888-A, 3 F.E.R.C. Stats. & Regs. ¶ 31,048; Order No. 888-B, 81 F.E.R.C. ¶ 61,248. Relevant portions of those orders are reprinted in Pet. App. D1-D125, E1-E120, and F1-F21; 00-809 Pet. App. 125a-369a, 371a-551a; 00-800 Pet. App. 1a-111a.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1-B2) was entered on June 30, 2000. A petition for rehearing was denied on August 22, 2000 (Pet. App. A1-A2). The petition for a writ of certiorari in No. 00-568 was filed on October 12, 2000. The petitions in Nos. 00-800 and 00-809 were filed on November 20, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Part II of the Federal Power Act (FPA or the Act), 16 U.S.C. 824-824m, confers on the Federal Energy Regulatory Commission (FERC or the Commission) jurisdiction over rates, terms, and conditions of electric transmission service provided by public utilities in interstate commerce.[2] Section 201(b)(1) of the FPA

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[1] Unless otherwise indicated, references to "Pet. App." are to the appendix to the certiorari petition in No. 00-568.

[2] Section 201(e), 16 U.S.C. 824(e), defines "public utility" as "any person who owns or operates facilities subject to the jurisdiction of the Commission." Section 201(f), 16 U.S.C. 824(f), excludes from FERC's jurisdiction companies owned by "the

authorizes the Commission to exercise jurisdiction over "the transmission of electric energy in interstate commerce," "the sale of electric energy at wholesale in interstate commerce," and "all facilities for such transmission or sale of electric energy." 16 U.S.C. 824(b)(1). Jurisdiction over "facilities used in local distribution or only for the transmission of electric energy in intrastate commerce" is left to the States. *Ibid.* Section 201(c) further provides that electric energy is transmitted in interstate commerce if it is "transmitted from a State and consumed at any point outside thereof." 16 U.S.C. 824(c).

Pursuant to Section 205(c) of the FPA, 16 U.S.C. 824d(c), public utilities subject to FERC's jurisdiction must file tariff schedules with FERC showing their rates and service terms, along with related contracts for jurisdictional service. Section 205(b) of the Act prohibits such utilities from "grant[ing] any undue preference or advantage to any person or subject[ing] any person to any undue prejudice or disadvantage." 16 U.S.C. 824d(b). Whenever the Commission finds that any rate charged by any such utility "for any transmission or sale," or that any utility's practice "affect[ing] such rate" is "unjust, unreasonable, unduly discriminatory or preferential," Section 206 of the Act directs FERC to prescribe a lawful rate or practice for the future. 16 U.S.C. 824e.

2. In recent years, the electric utility industry has evolved from a traditional, heavily regulated industry dominated by vertically integrated monopolies into a more competitive industry in which customers have choices as to their power suppliers. Pet. App. C8-C10.

United States, a State or any political subdivision of a State," except as specifically provided.

A key impediment to developing a competitive wholesale market for electric power is the monopoly ownership of interstate transmission systems: a utility that controls access to transmission services can deny market access to competitors and favor its own generation in competing for buyers. *Id.* at C10. In Order No. 888, the Commission found, based on an extensive rulemaking record, that public utilities were denying or providing inferior access by others to their transmission service, in violation of the nondiscrimination provisions of Sections 205 and 206 of the Act. 00-809 Pet. App. 213a-218a.

As a remedy, Order No. 888 requires public utilities that own or control transmission facilities to offer transmission service to customers on terms comparable to the transmission service they use in serving their own power customers. Order No. 888 also prescribes certain minimum terms and conditions of service necessary to provide nondiscriminatory open-access service and requires utilities to file tariffs setting out those terms and conditions. Pet. App. C10-C11, D9. The Order further requires the unbundling of electric utilities' wholesale electricity product into separately priced sales and transmission services, and requires utilities to take transmission service for their own wholesale sales and purchases under the same open access tariff applicable to others. 00-809 Pet. App. 178a.

During the course of its rulemaking, the Commission addressed several issues concerning its jurisdiction over transmission of electric energy in light of the Act's provisions giving the States jurisdiction over local distribution and retail sales of electric energy. Among those issues was whether federal authority extended to the interstate transmission component of a public utility's sale of power to its retail customers. As the

Commission recognized, a growing number of States have permitted or required utilities that provide retail service to unbundle their services so that customers can purchase power from sources other than their historical suppliers. Pet. App. D7. Such unbundling, in turn, required the Commission to determine which transmission facilities and services would be subject to the nondiscriminatory tariffs of Order No. 888. The Commission resolved that jurisdictional question as follows:

> [W]e believe that when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail. Under the FPA, the Commission's jurisdiction over sales of electric energy extends only to wholesale sales. However, when a retail transaction is broken into two products that are sold separately (perhaps by two different suppliers: an electric energy supplier and a transmission supplier), we believe the jurisdictional lines change. In this situation, the state clearly retains jurisdiction over the sale of the power. However, the unbundled transmission service involves *only* the provision of "transmission in interstate commerce" which, under the FPA, is exclusively within the jurisdiction of the Commission.

Id. at D44 (emphasis added). Given FERC's jurisdiction over unbundled transmission, the agency further distinguished between wholesale and retail transactions. In the wholesale situation, FERC asserted exclusive jurisdiction over the rates, terms, and conditions of all unbundled transmission service and the facilities used to provide the transmission, regardless of whether those facilities are labeled "transmission," "distribution" or "local distribution." *Id.* at D43-D44, D122, F8.

Order No. 888 thus requires public utilities offering such transmission to file transmission rate schedules with FERC that comply with its open-access rule, and provides that a share of the cost of transmission assets previously included in retail rate base will now be included in rate base subject to FERC's exclusive jurisdiction. *Id.* at D44-D53.

In the retail situation, however, FERC recognized both the States' continuing jurisdiction under Section 201 over "facilities used in local distribution," and the absence of any bright line to distinguish those facilities from interstate transmission facilities. The Commission therefore adopted a test to distinguish between transmission facilities and local distribution facilities, based on the function and technical characteristics of the facilities. Pet. App. D19-D20.[3] FERC also stated that it would defer to state recommendations in such matters, including where to draw the jurisdictional line between transmission and local distribution under FERC's test. *Id.* at D41-D52.

FERC further clarified several other aspects of its exercise of jurisdiction over unbundled transmission for

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[3] The test takes into account the following factors:

> (1) Local distribution facilities are normally in close proximity to retail customers; (2) Local distribution facilities are primarily radial in character; (3) Power flows into local distribution systems; it rarely, if ever, flows out; (4) When power enters a local distribution system, it is not reconsigned or transported on to some other market; (5) Power entering a local distribution system is consumed in a comparatively restricted geographical area; (6) Meters are based at the transmission/local distribution interface to measure flows into the local distribution system; (7) Local distribution systems will be of reduced voltage.

Pet. App. D19-D20.

retail sale. First, FERC emphasized that in exercising jurisdiction over the rates, terms, and conditions of the transmission component of unbundled retail transactions, it was not asserting authority either to order the unbundling of retail transactions or to order retail transmission to an ultimate consumer. Rather, its jurisdiction attaches only *if* retail transmission has been unbundled from the retail sale, either voluntarily by the utility or as a result of a state-ordered retail program. Pet. App. D44. Second, FERC clarified that its jurisdiction over the rates, terms, and conditions of unbundled retail transmission would not affect matters traditionally left to the States, "including authority to regulate the vast majority of generation asset costs, the siting of generation and transmission facilities, and decisions regarding retail service territories." *Id.* at D12; see also *id.* at D46 & n.544.

Order No. 888 also addresses problems created by "stranded costs," *i.e.*, a utility's sunk plant and other costs that it cannot recoup when customers, who previously took bundled service from the utility, take advantage of open-access transmission to purchase cheaper power from other suppliers. Pet. App. C11. Order No. 888 affords utilities an opportunity to recover such costs from a former customer that purchased its power requirements from the utility, but only if (a) the customer uses the former utility's transmission system to reach the new supplier, and (b) the utility shows a "reasonable expectation" that it would have continued to serve that customer beyond the end of its contract term. *Id.* at C11, C42-C48, D53-D54. With respect to costs stranded where retail customers are able to find new suppliers as a result of state retail unbundling, FERC recognized the primacy of state jurisdiction, and therefore took the position

that it would serve as a forum for cost recovery only if a state regulator lacked authority to do so and the departing customer uses a FERC transmission tariff to reach its new supplier. *Id.* at D80-D84, E91-E96.[4]

3. In a unanimous per curiam decision, the court of appeals upheld FERC's rules "in nearly all respects." Pet. App. C8.[5] The court first held that FERC had authority to require open access by virtue of its authority under Sections 205 and 206 to remedy undue discrimination by public utilities. *Id.* at C16-C19. The court of appeals relied in part on its decision in *Associated Gas Distributors* v. *FERC*, 824 F.2d 981 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988), in which it upheld a similar open-access requirement imposed by FERC on natural gas transportation under parallel provisions of the Natural Gas Act (NGA). See Pet. App. C17-C19, C21-C22. The court further held that FERC permissibly relied on generic findings of undue discrimination by utilities, and that FERC therefore was not required to find each individual utility's rates or practices unlawful. *Id.* at C19-C22.

The court also affirmed the jurisdictional basis for Order No. 888. Pet. App. C26-C38. The court explained that "[b]oth FPA [Sections] 201(a) and (b) clearly and unambiguously confer upon FERC jurisdiction over the 'transmission of electric energy in interstate commerce.'" *Id.* at C30-C31. The court

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[4] FERC also stated that it would serve as the primary forum for recovery of stranded costs where former retail customers become wholesale customers through what is known as municipalization or municipal annexation. Pet. App. C79.

[5] The court remanded to the agency to explain its treatment of certain stranded energy costs and to provide a reasonable cap on certain contract extensions. Pet. App. C12.

observed (*id.* at C31-C32) that this Court held in *FPC* v. *Florida Power & Light Co.*, 404 U.S. 453 (1972), that the very interconnection of utilities to the interstate grid results in a commingling of electricity and energy flows across state lines in interstate commerce, and under that precedent, "the FPA gives FERC the authority to regulate the transmissions at issue here, whether retail or wholesale." Pet. App. C33. The court also sustained FERC's decision not to assert jurisdiction over retail transmission that remains bundled with retail sales, reasoning that the Act is ambiguous with respect to the issue and that FERC's decision "represents a statutorily permissible policy choice to which [the court] must * * * defer under *Chevron*." *Id.* at C34. At the same time, the court rejected the challenge by certain States to FERC's exercise of jurisdiction over local distribution facilities that are used in wholesale transactions. The court concluded that since "FPA [Section] 201(a) makes clear that all aspects of wholesale sales are subject to federal regulation, regardless of the facilities used[,] FERC's assertion of jurisdiction over all wholesale transmissions, regardless of the nature of the facility, is clearly within the scope of its statutory authority." *Id.* at C37.

The court further held that FERC could permit recovery of retail stranded costs, in situations in which customers take advantage of state-ordered wheeling and state commissions lack the authority to award recovery of such costs. The court reasoned that "costs" are not jurisdictional and, thus, while Section 201(b) of the Act denies FERC jurisdiction over "facilities used for the generation of electric energy," 16 U.S.C. 824(b), "that provision does not necessarily prevent FERC from including *costs* relating to generating facilities in

transmission *rates*, over which FERC indisputably has jurisdiction." Pet. App. C81.

ARGUMENT

1. a. Petitioner Board of Water, Light and Sinking Fund Commissioners of the City of Dalton, Georgia (Dalton) argues (00-800 Pet. 7-10, 14-22) that FERC's reliance on generic findings of undue discrimination and its open-access remedy conflict with Section 206(a)'s requirement that FERC must premise a remedy on a finding that each individual utility's practice "affecting" a rate "is" unduly discriminatory.[6] That contention lacks merit.

FERC specifically concluded that "there is more than sufficient reason to believe that transmission monopolists *currently* engage in unduly discriminatory practices, and that they will continue to engage in unduly discriminatory practices, unless [FERC] fashion[s] a remedy to eliminate their ability and incentive to do so." 00-809 Pet. App. 216a (emphasis added). FERC based that finding on its own experience in reviewing applications and complaints, public comments presenting examples and allegations of widespread discrimination, and its determinations concerning the existence of systemic monopoly conditions and the economic self-interest of transmission monopolists–as well as FERC's expert prediction that such discrimination would likely

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[6] Dalton also suggests (00-800 Pet. 16-18) that its own circumstances justify the conclusion that FERC erred in making generic findings of discrimination and imposing a generic remedy. The court of appeals, however, found that contention not ripe for review, Pet. App. C24, and Dalton does not challenge that ruling in this Court.

increase in the future. Pet. App. C20-C21; 00-809 Pet. App. 209a-218a, 213a-214a, 315a-331a.[7]

The court of appeals therefore properly held that the agency's rules need not be premised on "specific findings" for each individual company where, as here, the agency's factual determinations are reasonable. Pet. App. C21. The court of appeals noted that it had previously upheld FERC's authority to proceed by rulemaking in exercising its parallel authority to address discriminatory practices under Section 5(a) of the NGA, 15 U.S.C. 717d(a), that Congress had ratified that approach in 42 U.S.C. 7173(c), and that the court had rejected similar challenges to FERC's ordering of open-access in the natural gas industry in *Associated Gas Distributors*, 824 F.2d at 1008. The court of appeals' decision upholding FERC's exercise of that settled authority in Order No. 888 presents no issue warranting this Court's review.

b. Dalton also contends (00-800 Pet. 22-27) that Order No. 888 conflicts with *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973). In that case, this Court held that the FPA did not preempt an antitrust remedy that ordered involuntary wheeling (*i.e.*, mandatory transmission for a third party), reasoning that "[s]o far as wheeling is concerned, there is no authority

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[7] It is well-settled that an agency may rely on established economic principles in promulgating rules. See, *e.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747, 792-795 (1968) (upholding Commission's rejection of contract pricing based on considerations of, inter alia, "market imperfections" and a "monopsonistic environment"); see also Pet. App. C22. Dalton does not challenge either that proposition or the Commission's authority to proceed by rulemaking rather than case-by-case adjudication. See 42 U.S.C. 7173(c) ("[T]he establishment of rates and charges under [the FPA] * * * may be conducted by rulemaking procedures.").

granted the Commission under Part II of the Federal Power Act to order it, for the bills originally introduced contained common carrier provisions which were deleted." *Id.* at 375. As the court of appeals explained, however, *Otter Tail* does not address whether the Commission may order wheeling in the exercise of its authority under Sections 205 and 206 to remedy undue discrimination. Pet. App. C18-C19. Those provisions specifically confer on FERC the authority to prescribe rates and practices upon a finding of undue discrimination, and the court of appeals correctly held that FERC has reasonably construed those provisions as conferring broad authority to remedy unduly discriminatory behavior by an open-access requirement. *Id.* at C19. As the court of appeals also pointed out (C18-C19), that court rejected similar arguments based on *Otter Tail* in *Associated Gas Distributors* some 13 years ago. See 824 F.2d at 998-999. In this respect as well, then, the court of appeals' decision breaks no new ground and presents no issue warranting review by this Court.[8]

2. The petitioners in No. 00-568 are nine state regulatory commissions (the States) that challenge (Pet. 12-19) FERC's jurisdiction over the transmission service

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[8] There similarly is no merit to Dalton's claim (00-800 Pet. 26-27) that the Commission's open-access rule is inconsistent with the authority to order wheeling on a case-by-case basis under Section 211 of the FPA, 16 U.S.C. 824j. Nothing in Section 211 undermines the Commission's remedial authority under Section 206. See 16 U.S.C. 824k(e)(1) (Section 211 "shall not be construed as limiting or impairing any authority of the Commission under any other provision of law."); see also 00-800 Pet. App. 69a-70a. As the Commission explained, the authority conferred by Section 211 was simply inadequate to meet the industry-wide conditions it sought to address in Order No. 888. *Id.* at 45a-46a.

involved in unbundled retail transactions. The court of appeals properly rejected their contentions.

a. Section 201(b) explicitly gives FERC jurisdiction over all "transmission of electric energy in interstate commerce" and "all facilities for such transmission," regardless of whether the transmission is part of a wholesale or retail transaction. In *FPC* v. *Florida Power & Light Co.*, 404 U.S. 453, 462-463 (1972), this Court recognized that when a utility's transmission lines connect to an interstate grid, the utility's energy commingles with that of other utilities so that inevitably some energy is transmitted across state lines and becomes interstate in nature.[9] The court of appeals therefore correctly concluded that "the FPA gives FERC the authority to regulate the transmissions at issue here, whether retail or wholesale." Pet. App. C33. The States' arguments to the contrary lack merit.

i. The States argue (00-568 Pet. 12) that the court of appeals improperly deferred to the Commission's view of its jurisdiction. The court held, however, that it was bound by this Court's interpretation in *Florida Power & Light* of "interstate transmission" under Section 201, and held only alternatively that it would defer to

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[9] For that reason, the States' reliance (00-568 Pet. 15-16) on Section 201(c), 16 U.S.C. 824(c), which states that energy is transmitted in interstate commerce if "transmitted from a State and consumed at any point outside thereof," is misplaced. With transmission interconnection, some of the electricity generated and transmitted in one State is almost inevitably consumed "outside thereof." That conclusion, however, does not create a null set of "intrastate transmission" under the FPA, because utilities may have no interconnection that would permit the physical transmission of power outside of a State, such as in Alaska, Hawaii, and most areas of Texas. See Pet. App. D43 n.541.

FERC's interpretation of its jurisdictional authority. See Pet. App. C33. In any event, this Court repeatedly has deferred to an agency's reasonable interpretation of a statute affecting the scope of its jurisdiction. See, *e.g.*, *Reiter* v. *Cooper*, 507 U.S. 258, 269 (1993); *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988); *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987); *CFTC* v. *Schor*, 478 U.S. 833, 845 (1986); see also *Mississippi Power & Light Co.* v. *Moore*, 487 U.S. 354, 380-382 (1988) (Scalia, J., concurring in the judgment) (collecting cases on question of deference to agency's interpretation of statute concerning its jurisdiction).

ii. The States argue (00-568 Pet. 14-15) that Order No. 888 conflicts with the statements by FERC and the Federal Power Commission (FPC) in congressional hearings and briefs to this Court that Section 201 does not extend the Commission's jurisdiction to retail sales. Neither FERC nor the FPC, however, has ever taken a position on the jurisdictional issues presented in this case. In Order No. 888, FERC addressed for the first time its view of the jurisdictional consequences of dramatic changes since enactment of the FPA, *i.e.*, the increase in competition in the electric utility industry and the advent of unbundled services. In light of those economic realities, FERC was well within its broad authority "to 'adapt [its] rules and policies to the demands of changing circumstances.'" *FDA* v. *Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1313 (2000) (quoting *Motor Vehicle Mfrs. Ass'n of United States* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 103 (1983) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968))); see also *American Trucking Ass'ns* v. *Atchison, T.& S.F. Ry.*, 387 U.S. 397, 415 (1967) ("[T]he Commission, faced with new

developments, or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation.").

iii. The States further argue (00-568 Pet. 16) that Order No. 888 conflicts with Section 212(h) of the Act, 16 U.S.C. 824k(h), which sets forth the terms, conditions, and limitations on FERC's authority under Section 211, 16 U.S.C. 824j, to require transmission wheeling on a case-by-case basis, and provides that nothing in Section 212(h) "shall affect any authority of any State or local government under State law concerning the transmission of electric energy directly to an ultimate consumer." That provision has no application here, and in no way purports to limit FERC's jurisdiction under Section 201(b) over the rates, terms, and conditions of the transmission of electric energy in interstate commerce. Section 212(h) simply prohibits FERC from ordering transmission directly to an ultimate consumer, and in the challenged orders FERC disavowed any power to do so. Pet. App. D44. Moreover, when a utility engages in retail unbundling, either voluntarily or as required by state law, the States retain authority under Order No. 888 over local matters such as power production, customer service, and local reliability. *Id.* at D44-D46.

iv. The States assert (00-568 Pet. 17) that the Commission's exercise of jurisdiction over the transmission component on an unbundled retail transaction conflicts with this Court's observation in *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 215 (1964), that Section 201 creates a "bright-line" jurisdictional test between wholesale (*i.e.*, sales for resale) and retail (*i.e.*, direct) sales of energy. Order No. 888, however, does not depart from that test, but rather requires FERC to distinguish between facilities used for *transmission* and

facilities used for *local distribution.*[10] Indeed, the Court in *Southern California Edison*, 376 U.S. at 210 n.6, acknowledged the absence of such a bright-line distinction in that respect, concluding that the issue "involves a question of fact to be decided by [the agency] as an original matter." See also *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515, 531-536 (1945).[11]

v. The States argue (00-568 Pet. 18) that, as a policy matter, Order No. 888 undermines competition because it will encourage States not to order retail unbundling for fear of losing jurisdiction over transmissions associated with retail transactions. That contention erroneously assumes that States will not weigh their consumers' best interests in deciding for, or against, retail wheeling, but will be concerned only with protecting their own jurisdiction. In any event, the States have made no showing that Order No. 888 actually has deterred any State from ordering retail

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[10] Contrary to the States' suggestion (00-568 Pet. 17), the decision below does not conflict with *Northern States Power Co.* v. *FERC*, 176 F.3d 1090, 1096 (8th Cir. 1999), cert. denied, 120 S. Ct. 1221 (2000), which addressed aspects of Order No. 888's curtailment provisions. The decision in that case did not address FERC's jurisdiction over unbundled retail transmissions, facilities used in wholesale transactions, or stranded costs caused by FERC's open-access requirement.

[11] The States' reliance (00-568 Pet. 18) on *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 394 (1983), for the proposition that "mere interconnection of electric utilities is not enough to defeat state jurisdiction" is likewise misplaced. In that case, the Court had already determined that the FPA did not cover the transactions by rural power cooperatives that were at issue, before finding that regulation of wholesale rates was within the legitimate scope of local interests, notwithstanding a connection to the interstate grid. *Id.* at 384-385.

unbundling, and we have been advised by FERC that many States have ordered retail unbundling even after Order No. 888 became effective.

b. The States also challenge (00-568 Pet. 19-21) FERC's exercise of jurisdiction over local distribution facilities used in wholesale transmission transactions. The court of appeals properly rejected that argument, reasoning that Section 201(b) limits FERC jurisdiction over local distribution facilities "*except* as specifically provided in this subchapter and subchapter III," 16 U.S.C. 824(b)(1) (emphasis added), and Section 201(a) "makes clear that all aspects of wholesale sales are subject to federal regulation, regardless of the facilities used." Pet. App. C37. Consistent with Section 201(b)'s reservation of state jurisdiction over "facilities used in local distribution," Order No. 888 preserves the traditional areas of state regulation. Thus, where a public utility is transmitting unbundled energy to an end user —*i.e.*, where the transmission is connected to a retail rather than a wholesale transaction—Order No. 888 acknowledges that some of the facilities involved are local distribution facilities subject to state jurisdiction, and Order No. 888 establishes a test for defining the jurisdictional line on a case-by-case basis. *Id.* at D19-D20.

For similar reasons, the States err in arguing (00-568 Pet. 20) that Order No. 888 conflicts with this Court's observation in *Connecticut Light & Power Co.*, 324 U.S. at 531, that Congress's preservation of state jurisdiction in Section 201(b) over "facilities used in local distribution" is "a limitation on jurisdiction and a legal standard that must be given effect," regardless of whether the facility carries out-of-state energy. In Order No. 888, FERC has exercised jurisdiction over those facilities used in wholesale transactions, and it

has established a test to distinguish those facilities used for local distribution from those used for unbundled retail transmission. As the court of appeals concluded, Order No. 888 reasonably "recognizes the current reality that many primarily retail utilities engage in both local distribution and interstate transmissions, and seeks through the seven factors to discern each facility's primary function." Pet. App. C38.

There is likewise no merit to the States' contention (00-568 Pet. 19, 21) that the court of appeals' ruling upholding FERC's authority over all facilities used in wholesale transactions allows "FERC to usurp state power to ensure reliable local distribution," permits utilities to evade state regulation, and violates Congress's ban in Section 212(h), 16 U.S.C. 824k(h), on sham wholesale transactions. FERC stressed in its rulemaking that Order No. 888 would not affect traditional state jurisdiction over local service concerns, including reliability. Pet. App. D44-D53. Order No. 888 also does not affect the States' ability to set bundled retail rates, including a cost component reflecting use of facilities to deliver power to the ultimate consumer. FERC further stated that it would address on a case-by-case basis the possibility that transactions may be structured to avoid federal regulation, see, *e.g.*, *id.* at D52, and the States offer no reason to believe that FERC would approve a sham transaction barred by Section 212(h).

c. The States finally argue (00-568 Pet. 22-24) that FERC lacks the "backstop" authority to address requests for recovery of stranded costs arising out of state-ordered retail unbundling in the event that a state regulator lacks authority to provide for such recovery. The court of appeals correctly held, however, that the inclusion of stranded costs relating to genera-

tion facilities in transmission rates is a legitimate exercise of FERC's authority over transmission rates, because "[r]ates are jurisdictional; costs are not." Pet. App. C80-C81. For example, both FERC and a state commission may legitimately take the exact same plant costs into consideration in setting rates within their respective bailiwicks for setting wholesale and retail rates. *Id.* at C81. As the court explained, if a utility seeks to recover retail stranded costs in its FERC-jurisdictional transmission rates, FERC will exercise its traditional cost-of-service ratemaking jurisdiction to review those costs. *Ibid.* As the court further explained, both retail and wholesale stranded costs can be viewed as "costs" of providing transmission services because, while "such costs are not a cost of operating the physical transmission system, nevertheless, they are an economic cost incurred as a result of being required to provide retail transmission." *Id.* at C83 (quoting *id.* at E94 n.708). While agreeing that generation-related retail costs are not typically costs relating to transmission services, the court correctly held that "the fundamental changes wrought by state-ordered retail wheeling, as well as the narrow circumstances in which FERC will consider stranded-cost recovery claims, justify the conclusion that these costs are costs of providing transmission service." *Ibid.*[12]

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[12] The States similarly err in challenging (00-809 Pet. 24) FERC's exercise of jurisdiction over stranded costs in certain so-called "retail-turned-wholesale" situations where, for example, a municipal utility becomes the conduit by which a retail customer can switch from its historical local utility power supplier, using the local utility's FERC open access transmission tariff to reach a new supplier. Pet. App. D64-D65, E71-E78, F16-F19; 00-809 Pet. App. 499a n.479. In those situations, assuming the utility carries its burden of proof, FERC will provide for recovery through a customer-

FERC, moreover, has stated that "[t]he only circumstance" in which it would "entertain requests" to recover stranded costs relating to retail wheeling "is when the state regulatory authority does not have authority under state law to address stranded costs when the retail wheeling is required." Pet. App. C79. No such claim for recovery has been presented to the Commission in the almost five years since it issued Order No. 888, and the hypothetical circumstance of a state regulator not having authority to address the problem may never arise.

3. Petitioner Enron Power Marketing, Inc. argues (00-809 Pet. 11-16) that Section 201(b) requires the Commission to assert jurisdiction over transmission of electric energy that remains part of a bundled retail sale. The court of appeals, however, correctly declined to hold that the Commission must treat all bundled retail sales as separate sales and transmission services and assert jurisdiction over the transmission component of the transactions.

Although Section 201 clearly gives FERC jurisdiction over transmission in interstate commerce and wholesale sales, and the Act gives States jurisdiction over local distribution facilities and retail sales, the "statute is much less clear about exactly where the lines between those activities are to be drawn." Pet.

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specific surcharge to be added to the transmission rate. Pet. App. E85. The court of appeals correctly upheld FERC's authority in that respect, reasoning that "FERC's exclusive jurisdiction over all aspects of wholesale sales gives FERC all the authority it needs to include generation-related costs in rates, including even costs originally incurred to provide retail service." *Id.* at C91. Moreover, "[a]s in the retail wheeling context, these stranded costs are properly viewed as 'costs' of the former supplying utility's provision of open access transmission service." *Ibid.*

App. C34. The court of appeals therefore correctly held that "[a] regulator could reasonably construe transmissions bundled with generation and delivery services and sold to a consumer for a single charge as either transmission services in interstate commerce," over which FERC has jurisdiction, "or as an integral component of a retail sale," over which the States have jurisdiction. In those circumstances, the court properly deferred to FERC's decision to treat bundled transmission as part of retail sales as "a statutorily permissible policy choice." *Ibid.*[13]

Enron also contends (00-809 Pet. 17-22) that FERC's decision not to assert jurisdiction over bundled retail transmissions will have a detrimental impact on nondiscriminatory access to transmission services. FERC specifically considered the competing policy issues at stake, and permissibly determined that an exercise of its jurisdiction was not necessary to achieve nondiscriminatory open access to transmission services. In its

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[13] Enron argues (00-809 Pet. 14-15) that FERC's interpretation conflicts with this Court's interpretation in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 636 (1972), of Section 1(b) of the NGA, 15 U.S.C. 717(b), a provision parallel to Section 201(b) of FPA. That case did not address, however, the Commission's authority to regulate transmission bundled with retail sales, but simply held that the reservation to the States of jurisdiction over retail natural gas sales did not preclude the Commission from exercising jurisdiction over the curtailment of natural gas deliveries in times of shortage. 406 U.S. at 623. Enron similarly errs in relying (00-809 Pet. 15-16.) on the D.C. Circuit's decision in *Mississippi River Transmission Corp.* v. *FERC*, 969 F.2d 1215 (1992), which held that FERC may regulate the transportation embedded in a retail natural gas sale. That decision construed FERC's authority to issue a certificate for pipeline service under Section 7(c) of the NGA, 15 U.S.C. 717f(c), a provision with no parallel in the FPA.

Notice of Proposed Rulemaking, the Commission explained that its approach "raises the possibility that the quality of transmission service for retail purposes will be superior to the quality of transmission service offered for wholesale purposes," 00-809 Pet. App. 634a, and therefore sought public comment on how its "bifurcated approach would affect the public utility's incentives to provide nondiscriminatory open access wholesale transmission service," *id.* at 635a.

In its Final Rule, the Commission explained that "[t]he majority of commenters addressing this issue believe that unbundling retail services is unnecessary to establish a competitive market and to achieve nondiscriminatory open access transmission." 00-809 Pet. App. 234a. After reviewing those comments, as well as views of commenters opposing the Commission's approach, the Commission concluded that "[a]lthough the unbundling of retail transmission and generation, as well as wholesale transmission and generation, would be helpful in achieving comparability," the Commission did "not believe it is necessary." *Id.* at 235a. That policy judgment is reasonable, and does not warrant this Court's review.[14]

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[14] In the event that the Court were to grant the States' petition challenging Order No. 888's exercise of jurisdiction, the Commission would not oppose the Court's granting of Enron's petition as well.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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(5)

No. 00-800

IN THE

SUPREME COURT OF THE UNITED STATES

BOARD OF WATER, LIGHT AND SINKING FUND COMMISSIONERS OF THE CITY OF DALTON, GEORGIA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Page

I FERC'S GENERIC FINDINGS FAIL TO SUPPORT A FINDING THAT ANY PUBLIC UTILITY IS CURRENTLY ENGAGED IN UNLAWFUL UNDUE DISCRIMINATION UNDER THE FIRST PRONG OF SECTION 206(a) 2

II THE COMMISSION LACKS GENERIC AUTHORITY TO COMPEL TRANSMISSION 6

CONCLUSION 9

TABLE OF AUTHORITIES

Cases: **Page**

Associated Gas Distributors v. FERC,
824 F.2d 981 (D.C. Cir. 1987), cert. denied,
485 U.S. 1006 (1988) 7

FPC v. Sierra Pacific Power Co.,
350 U.S. 348 (1956) 1

FPC v. Southern California Edison Co.,
376 U.S. 205 (1964) 9

Florida Power & Light Co. v. FERC,
660 F.2d 668 (5th Cir. 1981), cert. denied,
459 U.S. 1156 (1983) 8

Keene Corp. v. United States,
508 U.S. 200 (1993) 8

Louisiana Public Service Commission v. FCC,
476 U.S. 355 (1986) 8

Northeast Utilities Service Co. v. FERC,
993 F.2d 937 (1st Cir. 1993) 4

Otter Tail Power Co. v. United States,
410 U.S. 366, 374 (1973) 1, 3, 6, 7,8, 9

Transmission Access Policy Study Group, et al. v. FERC,
225 F.3d 667 (D.C. Cir. 2000) 6

Administrative Agency Orders: **Page**

Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶31,036 (1996), clarified, 76 FERC ¶61,009 and 76 FERC ¶61,347 (1996), on rehearing, Order No. 888-A, FERC Stats. & Regs. ¶31,048 (1997), order on rehearing, Order No. 888-B, 81 FERC ¶61,248 (1997), on rehearing, Order No. 888-C, 82 FERC ¶61,046 (1998) ..... passim

Pacific Gas & Electric Company, 51 FPC 1030 (1974), reh'g denied, 51 FPC 1543 (1974) 3

Pacific Gas & Electric Company, 65 FERC ¶61,312 (1993), remanded Pacific Gas & Electric Company v. FERC, No. 94-70037 (9th Cir. June 23, 1994) (unpublished opinion), order on remand, 69 FERC ¶61,006 (1994) 3

Utah Power & Light Company, 45 FERC ¶61,095 (1988) 3

Statutes:

Federal Power Act

§202(b) 6,7
§203 3
§206 8
§206(a) ..... passim
§211 3,8

REPLY BRIEF OF PETITIONER

Through the brevity of its response in opposition, the Federal Energy Regulatory Commission (Commission or FERC) avoids addressing the issues that warrant the grant of Dalton's Petition for Writ. By limiting its record citations to Order No. 888, the Commission fails to consider its subsequent concessions which demonstrate that its unlawful undue discrimination finding under the first prong of section 206(a) of the Federal Power Act (FPA), 16 U.S.C. 824e(a), is based on allegations and potential actions rather than actual unlawful activities. Surely this raises before this Court an issue of statutory construction as significant as the issue (which FERC recognizes) of the permissibility of the regulations promulgated by Order 888 which compel public utilities to wheel electric energy. At no place does the Commission explain how the second prong of section 206(a) provides it with a general authority to compel wheeling in the face of the Solicitor General's persuasive arguments to this Court in Otter Tail Power Co. v. United States, 410 U.S. 366, 374 (1973), that the FPA gave the Commission only very limited wheeling authority.

Section 206(a) is the Commission's most important procedural mechanism to curb abuses of public utilities' monopoly power over transmission. See FPC v. Sierra Pacific Power Co., 350 U.S. 348, 353 (1956). The resolution of the issues raised by this appeal is important to the administration of the FPA. The grant of Dalton's Petition for Writ is needed in these turbulent times in the interstate electric industry (a) to prevent the further use of generic findings as to potential conduct as evidence of unlawful undue discrimination under the first prong of section 206(a), and (b) to provide a "bright-line" jurisdictional test to distinguish the transmission which public utilities may undertake voluntarily under the FPA from transmission which the Commission may compel them to provide under the Act.

I

FERC'S GENERIC FINDINGS FAIL TO SUPPORT A FINDING THAT ANY PUBLIC UTILITY IS CURRENTLY ENGAGED IN UNLAWFUL UNDUE DISCRIMINATION UNDER THE FIRST PRONG OF SECTION 206(a)

1. Dalton's appeal raises an issue of statutory construction. It is not Dalton's position that the Commission may not rely on generic findings to support a finding that all public utilities are engaged in a practice which is unduly discriminatory within the meaning of the first prong of section 206(a). Cf. FERC at 8. But those findings must meet the standards of section 206(a). It is Dalton's view that the Commission's burden of persuasion under the first prong of section 206(a) is not diluted when it relies on generic findings.

2. To demonstrate compliance with the first prong of section 206(a), the Commission quotes its generic finding in Order 888 that transmission monopolists "currently engage in unduly discriminatory practices". FERC Br. at 10. This conclusory finding is not supported by a footnote reference to the record. Recognizing this, the Commission cites findings in other portions of Order 888, directing the Court to certain texts found in the Appendix to the Petition for Writ filed by Enron Power Marketing, Inc. (Enron) in 00-809.[1] Id. A review of these "findings" reveals that they contain long recitals of allegations, some specifically challenged by the public utilities allegedly involved. Appendix C to Order 888, the largest part of the record thus relied upon, is entitled "Allegations of Public

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[1] Enron App. 209a-218a, 213a-214a, 315a-331a.

Utilities Exercising Transmission Dominance." Enron App. 315a. The text begins: "These are examples of allegations that various public utilities have refused to provide comparable service . . ." Id. at 316a. The Commission relies on a few of its earlier orders which, we submit, do not support the Commission's ultimate finding of undue discrimination. A 1974 order initiated an investigation against Pacific Gas & Electric Company under section 206 and, at the same time, denied a request to order the utility to wheel power for a petitioner because such a remedy was beyond the Federal Power Commission's authority under Otter Tail. See Enron App. 614a, n. 149; Pacific Gas & Electric Company, 51 FPC 1032, 1033 (1974) ("Further, with respect to wheeling, it has been determined that the Commission does not have the authority to order wheeling (Cf. Otter Tail Power Co. v. U.S., 410 U.S. 366 (1973).") A 1993 order involving the same public utility held that a rate increase was prohibited by an underlying contract. See Enron App. 215a. The Commission found over a decade ago, in the context of a merger case under section 203 of the FPA, 16 U.S.C. 824b, that Utah Power & Light Company refused to permit wheeling. Enron App. 614a, n. 148.[2] The Commission also relies on the findings in Otter Tail, a case decided (and the unlawful practices remedied) more than a quarter century ago. Id. Casting about for further support, the Commission went so far as to rely on requests for transmission relief under FPA section 211, 16 U.S.C. 824j,[3] a statutory provision which clearly give the Commission authority to remedy unduly discriminatory conduct on a case-by-case basis. At the same time, the Commission brushed aside countervailing evidence

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[2] The Commission incorporated in Order 888 some of the findings in its Notice of Proposed Rulemaking. See Enron App. 215a, n. 260.

[3] Enron App. 216a.

that 106 public utilities had voluntarily offered to provide transmission under various open access tariffs, because approval of those tariffs would impair the Commission's obvious purpose to impose an industry-wide uniform Open Access Transmission Tariff (OATT).[4] This forced uniformity ignored the fact that mere differences in service are not unlawful. The statute forbids undue discrimination. See Northeast Utilities Service Co. v. FERC, 993 F.2d 937, 953-54 (1st Cir. 1993).

3. Dalton does not argue that the Commission should have made specific findings as to "each individual company" (emphasis added). Cf. FERC Br. at 11. Dalton does assert that appropriate findings were not made as to any public utility. In its brief in opposition the Commission neither denies nor accounts for post-Order 888 events which had a direct bearing on its generic findings of undue discrimination in Order 888. In Order 888-A, on rehearing, the Commission held that Order 888 "does not, nor was it intended to, make specific findings as to any particular utility or any particular allegation raised." (footnote omitted)[5] On appeal, the court below found: "FERC concedes that it relied upon general findings of systemic monopoly conditions and the resulting potential for anti-competitive behavior, rather than evidence of monopoly and undue discrimination on the part of individual utilities." NY App. C-20-C-21. By limiting its record citations on undue discrimination, the Commission never comes to grips with Dalton's contention that neither allegations of wrongdoing nor potentials to violate the law rise to the indignity of a violation of the first prong of section 206(a).

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[4] Id. at 218a, n. 266.

[5] Id. at 435a.

4. Enron, a large marketer of electric energy, denies that the construction of the text of the first prong of section 206(a) is an issue properly before this Court. Enron Br. at 7-8. To this end, it urges the Court to accept the Commission's general findings as to undue discrimination without examining either their real nature or the substance of the record behind them. Apparently it is enough for Enron that the Commission relied on "structural facts and elementary economics". Id. at 10. But this ignores the basic purpose of section 206(a).

Monopoly was a hallmark of the electric transmission business in 1935 when Part II of the FPA was enacted. Such monopolies were not outlawed by the statute. Private ownership was not separated from control and responsibility. Because monopolists can be expected to act in their own economic self interest (FERC Br. at 10), Congress enacted section 206(a) to provide a procedure for curbing abuses of those monopolies. Economic principles have a part to play in regulation under the FPA, but they can neither expand the reach of the statute nor provide a surrogate for the findings of actual illegal practices required by the first prong of section 206(a). Cf. FERC Br. at 11, n. 7.

5. The Court of Appeals held that it was premature for Dalton to challenge the effect of Order 888 on Dalton's rights under the antitrust conditions in certain nuclear licenses. Dalton has not raised that issue before this Court. However, Dalton does assert that neither the Commission's generic finding as to industry-wide undue discrimination nor the imposition of the OATT is appropriate as to Georgia Power Company in view of the evidence of that public utility's lack of monopoly power in the transmission of electric energy and the positive effect on competition of the integrated operation of the transmission system in Georgia under filed open access Inte-

grated Transmission System Agreements. Cf. FERC Br. at 10, n. 6; Enron Br. at 11, n. 3.

II

THE COMMISSION LACKS GENERIC AUTHORITY TO COMPEL TRANSMISSION

1. The decision in Transmission Access Policy Study Group, et al. v. FERC, 225 F.3d 667 (D.C. Cir. 2000) does break new ground. Cf. FERC Br. at 12. The Solicitor General and the Commission are now as one in arguing that the Commission "has reasonably construed" the second prong of section 206(a) as conferring "broad authority to remedy unduly discriminatory behavior by an open-access requirement." FERC Br. at 12. There was no such unanimity in 1972 when Otter Tail was briefed to this Court. The basic issue then was whether the Federal Power Commission (FPC), predecessor of FERC, had such broad jurisdiction under the FPA to compel transmission to remedy such anti-competitive conduct as the denial of open access to transmission requested by a competitor that it displaced a court-imposed wheeling obligation in an antitrust case. The FPC filed an amicus brief claiming exclusive jurisdiction based on its jurisdiction to order interconnections under section 202(b), 16 U.S.C. 824a(b), of the FPA. See Dalton Pet. at 25. The United States, represented by the Solicitor General, disagreed, asserting that "the Commission's limited authority to compel interconnections and sales of energy under Section 202(b) does not provide an effective remedy for refusals to deal and other anticompetitive conduct and thus does not bar judicially ordered relief in antitrust cases." Brief of the United States, p. 51, n. 40. The Solicitor General acknowledged, without criticism, Otter Tail's documentation of the "repeated failure of Congress to amend Part II of the Federal

Power Act to add wheeling authority". Id. at 95, n. 77. In Otter Tail this Court agreed with the Solicitor General and declined to defer to what the Commission undoubtedly believed was a "reasonable interpretation of a statute affecting the scope of its jurisdiction." Cf. FERC Br. at 14.

If we are to believe the Commission's brief in opposition in this case, the Commission was right and the Solicitor General was wrong in 1972 when the jurisdictional issue was briefed in Otter Tail; and both the Solicitor General and the Commission erred in failing to bring to the attention of this Court that a stealth provision in the FPA - the second prong of section 206(a) - actually gave the Commission all the authority it needed to compel Otter Tail to engage in wheeling energy to remedy the unduly discriminatory activities with which that public utility was then charged. But this is absurd. The second prong of section 206(a) has not been amended by Congress since 1935. When Otter Tail was briefed the FPC had had over 30 years of experience in regulating the electric industry under section 206(a). It knew the limitations of its authority under the FPA. That, we submit, is why it cited section 202(b) rather than 206(a) as the source of its claimed exclusive authority to compel wheeling.

2. Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988) (AGD), provides no "settled authority" as to the scope of the Commission's jurisdiction to compel all public utilities to provide transmission under section 206(a). Cf. FERC Br. at 11. The Commission states that the Court of Appeals "relied in part" on AGD in affirming the Commission's order requiring involuntary open access transmission. Id. at 8. The Court of Appeals showed no such restraint. It held that AGD "controls the disposition of this issue." (emphasis added.) NY App. C-18. In this the Court erred. AGD did not deprive the Court of

Appeals of its complete discretion when reviewing Order 888. See Dalton Pet. at 23-24. While the FPA and Natural Gas Act (NGA) have parallel provisions, AGD also involved provisions of the NGA which are not to be found in the FPA, namely, the authority to attach reasonable conditions to certificates of public convenience and necessity authorizing the construction and operation of natural gas pipelines. The Commission admits that it has no similar certificate authority as to electric transmission lines under the FPA. FERC Br. at 21, n. 13.

3. In an attempt to rebut Dalton's recital of the measured, modest steps taken by Congress to expand the Commission's transmission jurisdiction, the Commission argues that "[n]othing in Section 211 undermines the Commission's remedial authority under Section 206." FERC Br. at 12, n. 8. The Commission misses the point. After Otter Tail, Congress on two occasions legislated on the Commission's jurisdiction to compel transmission; in 1978 and in 1992. See Dalton Pet. at 26. As Congress oversees the activities of the Commission, it must be assumed that at those times Congress was well aware of the decision in Otter Tail. See Keene Corp. v. United States, 508 U.S. 200, 212 (1993). Nonetheless, in neither instance did Congress indicate that this Court was in error when it held: "So far as wheeling is concerned, there is no authority granted the Commission under Part II of the Federal Power Act to order it". 410 U.S. at 375. That Otter Tail was considered settled law is apparent from the statement in Florida Power & Light Co. v. FERC, 660 F.2d 668, 676 (5th Cir. 1981), cert. denied, 459 U.S. 1156 (1983): "The legislative history of the FPA makes clear that the Commission lacks the authority to require electric utilities to provide wheeling even on a reasonable request.".

4. It is the exclusive province of Congress to rewrite statutes. Louisiana Public Service Commission v. FCC, 476 U.S. 355, 376 (1986). Changes in the competitive scene,

technology and services do not provide the Commission with authority to perform that function. Cf. FERC Br. at 14. The caution exercised by Congress in expanding the Commission's authority over compulsory transmission makes it reasonable to conclude that, in the interest of assuring reliability of electric service, Congress intended that a bright-line jurisdictional test be applied to transmission, not unlike the test used to differentiate between wholesales and retail sales of electric energy in interstate commerce. See FPC v. Southern California Edison Co., 376 U.S. 205, 216 (1964). This Court recognized that distinction in Otter Tail, 410 U.S. at 374, when it stated: "It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships."

CONCLUSION

For the reasons stated, the Petition of Dalton for Writ of Certiorari should be granted.

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